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No. (1) 09-5[illegible]

In The
Supreme Court of the United States

JULIAN JAMES, INDIVIDUALLY, AND DAPHNE BATES HARRIS, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF HIJI EUGENE HARRISON, DECEASED, AND AS NEXT FRIEND OF H.E.H., A MINOR,

Petitioners,

v.

HARRIS COUNTY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

A plaintiff bringing a claim under 42 U.S.C. § 1983 introduced evidence that, before the incident in question, the law enforcement officer had several excessive-force complaints brought against him. In each of these previous circumstances, his supervisors did not investigate the allegations or challenge his story, and nothing else happened to him after the file was sent to the district attorney for review by the grand jury. Given the officer's participation in the process and the prior outcomes, could a reasonable jury infer the officer's knowledge that the Sheriff's Office had a policy to under-investigate excessive-force complaints and otherwise protect its own?

LIST OF PARTIES

The caption of the case contains the names of all the parties.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	1
STATUTORY PROVISION INVOLVED	1
STATEMENT OF THE CASE	2
Course of Proceedings and Disposition Below	2
Background Facts	4
I.	
Deputy Wilkinson's Account	5
The Evidence-Gathering at the Scene . . .	7
. . . by the Harris County Sheriff's Office Crime Scene Investigation Unit	7
. . . by the Harris County Sheriff's Office Homicide Unit	9
. . . by the Harris County District Attorney's Office	12
. . . by the Harris County Medical Examiner's Office	12
The Blatant Inconsistencies	13
II.	
The Wide-Spread Custom of "Under Investigating" Officer-Related Shootings	16
The Policy to Delegate Enforcement of the Civil Rights Laws to the Harris County District Attorney's Office	18

TABLE OF CONTENTS – Continued

Page

The Practice of Never Disciplining Deputy Wilkinson 19

REASONS FOR GRANTING REVIEW 23

I. The Court of Appeals undermines this Court's decisions by holding that Deputy Wilkinson's knowledge of the Sheriff's official policy only to cursorily investigate excessive-force complaints could not be inferred from the prior investigations of excessive-force complaints against him where his supervisors did not investigate his account of the incidents 24

II. The Court of Appeals improperly discounted Deputy Wilkinson's knowledge of the Sheriff's official policy to delegate all responsibility for investigating excessive-force complaints to another entity 26

III. The Court of Appeals' holding would encourage government agencies to create policies to thwart civil rights plaintiffs 28

CONCLUSION AND PRAYER FOR RELIEF 29

TABLE OF AUTHORITIES – Continued

Page

CASES:

Black v. Stephens, 662 F.2d 181 (3d Cir. 1981).....26

Bordanaro v. McLeod, 871 F.2d 1151 (1st Cir. 1989).....27

Bryan County v. Brown, 520 U.S. 397 (1997).....26

City of Canton v. Harris, 489 U.S. 378 (1989).....23

Coon v. Ledbetter, 780 F.2d 1158 (5th Cir. 1986).....26

Marchese v. Lucas, 758 F.2d 181 (6th Cir. 1985).....28

Oklahoma City v. Tuttle, 471 U.S. 808 (1985).....26

RULES AND STATUTORY PROVISION:

28 U.S.C. § 1254(1).....1

28 U.S.C. § 1331.....1

28 U.S.C. § 1343.....1

42 U.S.C. § 1982.....1

42 U.S.C. § 1983.....1, 23

42 U.S.C. § 1988.....1

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Texas is reported as *James v. Harris County*, 508 F. Supp.2d 535 (S.D. Tex. 2007). The opinion of the United States Court of Appeals for the Fifth Circuit is reported as *James v. Harris County*, 577 F.3d 612 (5th Cir. 2009).

JURISDICTIONAL STATEMENT

This is a civil rights case under 42 U.S.C. §§ 1983, 1982 and 1988. The district court had jurisdiction of the federal civil rights claims and pendent state law wrongful death claims under 28 U.S.C. §§ 1331 and 1343. This Court has jurisdiction under 28 U.S.C. § 1254(1). Petitioner seeks review of the final judgment the Fifth Circuit Court of Appeals entered on August 4, 2009.

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1983 provides, in relevant part, that "[e]very person, who under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . for redress."

STATEMENT OF THE CASE

This is a civil rights case arising from the death of Hiji Eugene Harrison. During the course of a traffic stop, Harris County Deputy Sheriff William Wilkinson shot him once in the back and three times in the face. (Dkt. No. 497 at 15, 22). This lawsuit seeks to recover damages for the constitutional deprivations ultimately resulting in his death.

Course of Proceedings and Disposition Below

The Harrison family filed this suit against Harris County and Deputy Sheriff Wilkinson. (Dkt. No. 180 at 1). The Harrison family alleged federal civil rights claims for excessive use of force and pendent state law wrongful death claims. (Dkt. No. 180 at 3). Specifically, the Harrison family alleged that Deputy Wilkinson acted pursuant to a policy or custom of the Harris County Sheriff's Office. (Dkt. No. 180 at 4). In addition, the Harris County Sheriff's Office failed to supervise Deputy Wilkinson or ratified Deputy Wilkinson's use of excessive force. (Dkt. No. 180 at 4-5). For these alternative reasons, the Harrison family asked that Harris County be held liable for Mr. Harrison's death. (Dkt. No. 180 at 5).

The case proceeded to trial in the United States District Court for the Southern District of Texas. (Dkt. No. 448). After two weeks at trial and six days of deliberation, the jury could not reach a verdict. (Dkt. No. 488). When the jurors could not agree on

the predicate question of whether Deputy Wilkinson used excessive force, the district court declared a hung jury. (Dkt. Nos. 488, 553 at 19).

A few weeks later, the district court granted Harris County's renewed motion for judgment as a matter of law. (Dkt. No. 532 at 2). The district court held that the Harrison family presented sufficient evidence for a reasonable jury to conclude that Deputy Wilkinson used excessive force. (Dkt. No. 532 at 9). The court, however, held that the Harrison family failed to present sufficient evidence to allow a reasonable jury to find that Harris County was liable for Deputy Wilkinson's use of excessive force. (Dkt. No. 532 at 11). The district court stated that the Harrison family failed to present sufficient evidence on its policy, failure to supervise, and ratification theories. (Dkt. No. 532 at 11).

The Harrison family appealed the district court's grant of judgment as a matter of law in favor of Harris County to the Fifth Circuit Court of Appeals. (Dkt. No. 539). A panel of the Fifth Circuit Court of Appeals affirmed the district court on the sole basis that "[a] reasonable jury could not find that the alleged policy was the moving force behind Wilkinson's alleged excessive force, when there was no evidence that Wilkinson had knowledge of such policy." App. at 14.

Background Facts[1]

Petitioners provide a detailed fact statement recounting, first, the fatal shooting of Hiji Eugene Harrison, and second, the customs and policies of the Harris County Sheriff's Office that caused it.

I.

On May 16, 2004, Deputy Wilkinson stopped Harrison's vehicle for speeding in the remote area of South Lake Houston Parkway in East Harris County. (Dkt. No. 497 at 142). The encounter occurred in the early morning hours at approximately 1:20 a.m. while Harrison was on his way home from work. (Dkt. No. 564 at 51). Unfortunately, no one witnessed the confrontation. (Dkt. No. 496 at 32). As a result, only Deputy Wilkinson and the subsequent investigation could explain how Harrison died. (Dkt. No. 496 at 32; PX 346; PX 347; PX 348; PX 349; PX 350; PX 351; PX 352; PX 353).

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[1] This fact statement relies on the testimonial and documentary evidence presented to the trial court. All of the referenced evidence was or should have been considered by the fact finder. Each piece of evidence was relevant, reliable, and proper under the prevailing admissibility standards. In the limited instances where the district court excluded portions of this evidence, the district court erred and the Harrison Family hereby complains about the improper exclusion of the proffered evidence.

Deputy Wilkinson's Account

Deputy Wilkinson testified at trial that he pulled over Harrison's vehicle and, after exiting his squad car and approaching Harrison's vehicle, spoke to Harrison. (Dkt. No. 497 at 143). Deputy Wilkinson explained that Harrison was compliant – he willingly provided his license and an expired insurance card. (Dkt. No. 497 at 143). Deputy Wilkinson went to his squad car to write a citation and, once he had finished doing so, returned to present Harrison with a ticket for speeding and failure to show current insurance. (Dkt. No. 497 at 144).

Deputy Wilkinson said he asked Harrison, at this point, whether he had any contraband in the vehicle. (Dkt. No. 497 at 144). Deputy Wilkinson then asked for consent to search the vehicle and Harrison agreed. (Dkt. No. 497 at 145). Before conducting the search, however, Deputy Wilkinson took Harrison from his vehicle, frisked him for weapons, and locked him in the squad car's backseat. (Dkt. No. 497 at 145-46). Deputy Wilkinson claims he did not handcuff Harrison at this point. (Dkt. No. 497 at 146).

Deputy Wilkinson then says he searched Harrison's vehicle. (Dkt. No. 497 at 146). He started in the front driver's seat and found nothing. (Dkt. No. 497 at 146-47). He then looked in the backseat and found nothing. (Dkt. No. 497 at 147). He opened the trunk compartment and found nothing. (Dkt. No. 497 at 147). When he went around to the passenger side, Deputy Wilkinson claims he saw a Kel-Tec pistol on

the floor board. (Dkt. No. 496 at 23). He picked up the weapon, but claims not to have checked to see if it was loaded. (Dkt. No. 497 at 147). And, on top of that, he claims that he left the gun on the car seat and the keys in the car door when he returned to the squad car to arrest Harrison. (Dkt. No. 497 at 147).

According to his account, Deputy Wilkinson opened the squad car's back seat door and told Harrison that he was under arrest. (Dkt. No. 497 at 148). He instructed Harrison to turn around in the seat and extend his arms behind him so that Deputy Wilkinson could put on handcuffs. (Dkt. No. 497 at 148). Once again, Harrison complied. (Dkt. No. 497 at 148). But after the first handcuff was secured, Deputy Wilkinson claimed that a fight occurred. (Dkt. No. 497 at 148). Harrison used his other hand – already extended behind his back – to pull Deputy Wilkinson into the squad car's back seat on top of Harrison. (Dkt. No. 497 at 148). Harrison then immobilized Deputy Wilkinson by pinning his left arm. (Dkt. No. 497 at 14). And Harrison was supposedly able to do all of this even though Harrison was in this awkward position and Deputy Wilkinson outweighed him by 100 pounds. (Dkt. No. 563 at 49-50).

During this struggle, Deputy Wilkinson claims that Harrison used his right hand to "fish and grab" for a gun. (Dkt. No. 497 at 15). Deputy Wilkinson says he feared for his life, pulled out his gun and shot Harrison in the back. (Dkt. No. 497 at 15). Harrison immediately released Deputy Wilkinson's left arm, allowing Deputy Wilkinson to back out of the car.

(Dkt. No. 497 at 15). Afterwards, Deputy Wilkinson fired three more shots into Harrison's face because he was scared Harrison might have come out and attacked him. (Dkt. No. 497 at 22). Deputy Wilkinson said that he held Harrison's body at gunpoint in the squad car's back seat and then used his radio to report the incident. (Dkt. No. 497 at 158).

The Evidence-Gathering at the Scene . . .

Immediately after this shooting, police deputies radioed on public broadcast until a sergeant was told that watch command, the person in charge of dispatch, was trying to reach him on his cell phone. (Dkt. No. 564 at 76; PX 361; PX 362; PX 363; PX 364; PX 365; PX 366; PX 367). The communication then became private and no one knew what was said afterwards. (Dkt. No. 564 at 76). Various law enforcement officials and investigators were dispatched to the scene of the shooting.

. . . by the Harris County Sheriff's Office Crime Scene Investigation Unit

Roy Glover, the lead crime scene investigator and one of the first to arrive, got to the scene at about 2:30 a.m. (Dkt. No. 538 at 75; PX 360). Upon arrival, Glover checked in with Deputy Hernandez, who was in charge of securing the scene. (Dkt. No. 538 at 12). Hernandez told Glover that Deputy Wilkinson fired all four shots while Deputy Wilkinson was standing outside the patrol car. (Dkt. No. 538 at 77; PX 346; PX

347; PX 348). At that time, he was not told anything about a fight between Deputy Wilkinson and Harrison. (Dkt. No. 538 at 73-74). Glover started his investigating assuming that no fight occurred in the patrol car. (Dkt. No. 538 at 14). Glover found no evidence suggesting that a fight took place in the backseat of the patrol car. (Dkt. No. 538 at 18). No gunshot residue was found in the backseat. (Dkt. No. 538 at 19). No blood spatter evidence was found inside the car. (Dkt. No. 538 at 19). No sweat or other fluids were found on the vinyl seats in the patrol car. (Dkt. No. 538 at 19-20). No evidence of Harrison's DNA was found on Deputy Wilkinson's belt, holster, holster release, or gun handle. (Dkt. No. 538 at 71-72).

About an hour after Glover arrived, he was told a different version of what happened. (Dkt. No. 538 at 73). During a videotaped statement, Deputy Wilkinson alleged that he fired the first shot in the back seat of the patrol car during a fight with Harrison. (Dkt. No. 538 at 72-73; PX 346). Deputy Wilkinson was never questioned about the inconsistencies in his testimony. (Dkt. No. 503 at 28).

During Glover's investigation, many items were not photographed and several of the photographs taken had areas blacked out. (Dkt. No. 503 at 21). No photographs were taken of the rear passenger side of the patrol car. (Dkt. No. 503 at 19). No photographs were taken of the trunk of Harrison's car. (Dkt. No. 503 at 20). No photographs were taken of Deputy Wilkinson's clothing or firearm. (Dkt. No. 503 at 23).

Many items were not photographed close up. (Dkt. No. 503 at 22-23). For example, no close up photographs were taken of Deputy Wilkinson's hand, where Harrison had allegedly bitten. (Dkt. No. 503 at 26-27). No measuring device, like a ruler, was put next to blood when those photographs were taken. (Dkt. No. 503 at 20). No measurements were taken of the rear seat in the patrol car, Harrison's body inside the rear seat area, how far the driver side rear door was open, or the blood splatter patterns. (Dkt. No. 503 at 21, 24). Glover also did not keep a photographic log that noted the camera settings, the distance between an object and the camera, the direction of the camera, and object intended to be photographed. (Dkt. No. 503 at 22).

. . . by the Harris County Sheriff's Office Homicide Unit

The next to arrive at the scene was Gregory Pinkins, the chief detective with the Harris County Sheriff's Office Homicide Unit. (Dkt. No. 534 at 9-10). He got there at 3:30 a.m. (Dkt. No. 534 at 9-10). Once there, Pinkins immediately arranged for Deputy Wilkinson's videotaped statement. (Dkt. No. 534 at 15). After looking at the evidence, Pinkins said that it was plausible that the handcuff was placed on Harrison's wrist after the shooting, but he believed Deputy Wilkinson's version of the events. (Dkt. No. 503 at 32). No investigation was conducted to determine whether the handcuff was placed on Harrison's wrist after he was shot. (Dkt. No. 503 at 30-31). After the

statement, Pinkins also assigned Detective Robert Tonry to collect Deputy Wilkinson's uniform. (Dkt. No. 534 at 15). This task was not completed until several hours after the shooting. (Dkt. No. 534 at 57). Pinkins assigned Detective Steven Wichkoski to work with Glover on the crime scene investigation. (Dkt. No. 534 at 15). Neither Glover nor Wichkoski processed the scene for fingerprints. (Dkt. No. 503 at 25).

After his work at the scene, Pinkins left to find Harrison's wife, Daphne Bates Harrison. (Dkt. No. 534 at 28). Along with Wichkoski and Tonry, Pinkins went to the Harrisons' apartment. (Dkt. No. 566 at 117). After directing the detectives to the porch because her son was inside, Daphne was told that her husband was shot and killed. (Dkt. No. 566 at 118). Pinkins claims that Daphne responded by spontaneously saying that her husband took a gun from the dresser the night before, telling her he was taking it to a friend. (Dkt. No. 534 at 52). Tonry and Wichkoski claim that they both heard Daphne make this statement. (Dkt. No. 564 at 95-96; Dkt. No. 564 at 120). But neither detective included this information in their detailed reports or could produce any notes showing they heard such a statement. (Dkt. No. 564 at 88-89, 96; Dkt. No. 564 at 112).

Daphne says she never told any detective that Harrison took a gun from the house on the night he was killed. (Dkt. No. 566 at 104-05). As support, Daphne points to a recorded interview she had with Pinkins, Wichkoski, and Sergeant Parker a couple of

weeks after Harrison's death. (Dkt. No. 566 at 112-13; PX 374). During the interview, lasting forty-seven minutes, they extensively discussed the conversation that took place on the Harrisons' porch. (Dkt. No. 535 at 4-5). However, no one mentioned that Daphne told the detectives her husband had a gun the night he was killed. (Dkt. No. 535 at 5). Additionally, Pinkins made no attempt to find the friend Harrison was supposedly referring to or search the Harrisons' residence for bullets or any other item that would link the Kel-Tec to Harrison. (Dkt. No. 534 at 56-57).

Pinkins did make one attempt to investigate who owned the Kel-Tec – Pinkins called the original owner of the pistol, Richard McGaughy. (Dkt. No. 573 at 36-37; PX 507; PX 508; PX 509; PX 510; PX 511; PX 512; PX 513). McGaughy said that the Kel-Tec was stolen from him while Georgette Lee, a Precinct 5 Constable, was executing a writ of attachment in January of 1998. (Dkt. No. 573 at 21; PX 381; PX 382; PX 385; PX 386). While Lee was executing the writ, two male deputies arrived and went into the office where McGaughy kept the Kel-Tec. (Dkt. No. 573 at 22; PX 382). When they left, the pistol was gone. (Dkt. No. 573 at 24; PX 382). Despite these allegations, Pinkins never got a sworn statement from McGaughy. (Dkt. No. 534 at 56; PX 382). No one tried to determine if McGaughy knew the male deputies' names or tried to conduct any follow-up investigation. (Dkt. No. 503 at 34; PX 382). Although Deputy Wilkinson – not Harrison – had connections to the Precinct 5 Constable Writ Division, there is no evidence that anyone

searched Deputy Wilkinson's locker or residence for the Kel-Tec. (Dkt. No. 496 at 14; Dkt. No. 503 at 36; PX 382).

. . . by the Harris County District Attorney's Office

Edward Porter, from the Harris County District Attorney's Office, also came to the scene. (Dkt. No. 494 at 20). Porter watched as the evidence was collected. (Dkt. No. 494 at 20). Later, he spoke to a wrecker driver, McGaughy, and Daphne. (Dkt. No. 494 at 20). But he never questioned Deputy Wilkinson or anyone from Precinct 5. (Dkt. No. 493 at 5-9, 22-23). He also did not have the Kel-Tec tested for DNA, fingerprints, or holster wear before presenting the case to the grand jury. (Dkt. No. 493 at 5-9). Nor did he do any kind of analysis on the handcuffs. (Dkt. No. 493 at 13-16). Porter could not disclose what evidence he presented to the grand jury, but the grand jury did not indict Deputy Wilkinson for Harrison's death. (Dkt. No. 493 at 39). The Administrative Review Board, the entity responsible for enforcing departmental policies, refused to impose punishment after reviewing the investigation of Deputy Wilkinson's actions and the grand jury's determination. (Dkt. No. 567 at 51-52; Dkt. No. 537 at 16-17).

. . . by the Harris County Medical Examiner's Office

The last lead investigator to arrive at the scene was Dr. Dwayne Wolf, from the medical examiner's

office, at 5:55 a.m. (Dkt. No. 563 at 170). This was because no one called the medical examiner's office until two and a half hours after the shooting. (Dkt. No. 564 at 94). Tonry finally called them at 3:45 a.m. – after Deputy Wilkinson's videotaped statement had been completed. (Dkt. No. 564 at 93, 173-74). When Dr. Wolf arrived, he examined the scene. (Dkt. No. 563 at 174-76). Later, Dr. Wolf conducted the autopsy. (Dkt. No. 563 at 177-78).

The Blatant Inconsistencies

Deputy Wilkinson's account conflicts with the evidence in the following material respects:

- Deputy Wilkinson claims he placed a handcuff on Harrison's left wrist, but there is no evidence of trauma to the left wrist anywhere in the area of this metallic handcuff. (*Compare* Dkt. No. 497 at 148 *with* Dkt. No. 563 at 28).

- Deputy Wilkinson claims he sustained bite marks to his hands during the fight. Dr. Young did not make any determination that Deputy Wilkinson had human bite marks. (*Compare* Dkt. No. 496 at 24 *with* Dkt. No. 563 at 50).

- Deputy Wilkinson claims he had a "life and death" struggle in the vehicle's backseat. The autopsy indicates Harrison had no bruises, contusions, injuries, or evidence consistent with any type of fight, let alone a life or death struggle.

(*Compare* Dkt. No. 497 at 150 *with* Dkt. No. 563 at 28).

- Deputy Wilkinson claims that he was wearing a metal-banded watch when his left hand and arm were pinned under Harrison. The medical reports contain no mention of scrape marks, bruises, scratches or abrasions either on Deputy Wilkinson or Harrison. (*Compare* Dkt. No. 497 at 14 *with* Dkt. No. 563 at 28; Dkt. No. 530 at 14).

- Deputy Wilkinson claims he struck Harrison numerous times about the head and neck area before shooting him. The autopsy shows no evidence of scrape marks, bruises, scratches or abrasions either on Deputy Wilkinson or Harrison's arm where the struggle allegedly occurred. (*Compare* Dkt. No. 496 at 25 *with* Dkt. No. 563 at 28).

- Deputy Wilkinson claims Harrison twice grabbed for the deputy's gun. DNA analysis found no evidence of Harrison's DNA anywhere on the gun, holster or service belt. (*Compare* Dkt. No. 497 at 153 *with* Dkt. No. 573 at 146-47). In addition, no evidence of Harrison's fingerprints were found anywhere near Deputy Wilkinson's gun. (Dkt. No. 573 at 145).

- Deputy Wilkinson claims he fired his gun in the backseat. No gunpowder residue was found anywhere in the

backseat. (*Compare* Dkt. No. 497 at 155 *with* Dkt. No. 538 at 19). The position of the shell casings shows that Deputy Wilkinson fired his gun while standing outside the car. (Dkt. No. 531 at 24).

- Deputy Wilkinson claims he wrestled and fought with Harrison in the backseat. No fibers from Harrison's clothing were found on Deputy Wilkinson's clothing. No fibers from Deputy Wilkinson's clothing were found on Harrison's clothing. (*Compare* Dkt. No. 497 at 150 *with* Dkt. No. 530 at 14). Deputy Wilkinson's DNA was not found in the backseat. (Dkt. No. 573 at 230-31).

- Deputy Wilkinson claims he had a handcuff on Harrison's left wrist at the time of the shooting. The handcuff had no blood splatter evidence on it, suggesting that Harrison was not wearing the handcuff at the time of the shooting. (*Compare* Dkt. No. 497 at 148 *with* Dkt. No. 530 at 16).

- Deputy Wilkinson claims he found a Kel-Tec handgun in Harrison's car. Richard McGaughy, the original owner of the Kel-Tec, testified that Harris County Constables took this gun from him at a time when Deputy Wilkinson worked as a Constable. (*Compare* Dkt. No. 497 at 147 *with* Dkt. No. 573 at 21-23). The gun was swabbed and dismantled on all external and internal surfaces for DNA.

Harrison's DNA was not found anywhere on the gun. (Dkt. No. 573 at 172).

- Deputy Wilkinson claims he shot Harrison perpendicular to Harrison's back. The autopsy and ballistics tests showed that the bullet traveled horizontally through the chest cavity. (*Compare* Dkt. No. 563 at 19 *with* Dkt. No. 563 at 21-22).

- Deputy Wilkinson claims he shot Harrison three times in the face because Harrison was coming toward him. The position of Harrison's body shows that Harrison had no forward momentum. (*Compare* Dkt. No. 497 at 22 *with* Dkt. No. 530 at 16).

II.

The fatal shooting of Hiji Eugene Harrison was not a random, isolated event. It was the inevitable culmination of an unwritten custom that has developed in the Harris County Sheriff's Office over the last twenty years.

The Wide-Spread Custom of "Under Investigating" Officer-Related Shootings

The evidence suggests that the Harris County Sheriff's Office had a well-known, common practice of deliberately "under investigating" officer-involved shootings. (Dkt. No. 563 at 127). In fact, former

Harris County Medical Examiner, Dr. Joye Carter, routinely complained about the Harris County Sheriff Deputies' frequent delays in calling the medical examiner's office after an officer-involved shooting. (Dkt. No. 563 at 127). Carter testified that she believed that the bodies were being disturbed before the medical examiner was called to the scene. (Dkt. No. 563 at 129-31). And, once the medical examiner arrived on the scene, Harris County Sheriff Deputies regularly pressured the medical examiner to concentrate on evidence that incriminated the victim and avoid anything that contradicted the officer's version. (Dkt. No. 563 at 129-31). Unlike other area law enforcement agencies, the medical examiner had trouble getting information in officer-related shootings from the Harris County Sheriff's Office. (Dkt. No. 563 at 129-31).

The last thirty-six officer-involved-shooting investigations in the Harris County Sheriff's Office were woefully lacking. (Dkt. No. 500 at 64-65). For example, the investigation never addressed the position of shell casings or the number of shots fired. (Dkt. No. 500 at 64-65). The files indicate that, although witnesses were present at the shootings, the witnesses were not named and no formal report of interviews were included. (Dkt. No. 500 at 64-65). The Harris County Sheriff's Office regularly collected inconsistent evidence without attempting to reconcile the different versions of the events. (Dkt. No. 500 at 86-87). Instead of concentrating on collecting physical evidence or reconciling inconsistencies, the Harris

County Sheriff's Office had a posture of simply taking the officer's word at face value. (Dkt. No. 500 at 64-67).

The Policy to Delegate Enforcement of the Civil Rights Laws to the Harris County District Attorney's Office

The internal affairs division does not conduct a separate and independent investigation from the homicide unit or other departments within the Harris County Sheriff's Office. (Dkt. No. 503 at 39-40). Rather, the investigator acts as a clerk by collecting the reports of the homicide unit and other agencies to submit to the Administrative Review Board. (Dkt. No. 503 at 39-43). When the Administrative Review Board receives the report, it does not make an independent decision about whether the officer used excessive force. (Dkt. No. 498 at 11). Instead, the Administrative Review Board waits to see if the grand jury hands down a criminal indictment against the Deputy Sheriff. (Dkt. No. 498 at 11).

This process is administered under a criminal law standard by another state agency, the Harris County District Attorney's Office. (Dkt. No. 498 at 11). Additionally, Texas law prohibits anyone involved in the process from disclosing what evidence was presented to or relied on by the grand jury. (Dkt. No. 493 at 41-42). This deliberate delegation of investigative power shields the entire process from the public, from the Administrative Review Board, and

from any potential plaintiff in a civil rights suit arising from the officer's actions. If evidence incriminating the Deputy Sheriff was not provided to the Harris County District Attorney's office or if the Harris County District Attorney did not present the incriminating evidence to the grand jury, no one could complain about it under the then-existing custom, policy and practice of the Harris County Sheriff's Office.

The Practice of Never Disciplining Deputy Wilkinson

Ironically, this was not the first time Deputy Wilkinson faced an abuse of power allegation. (PX 284; PX 285; PX 286; PX 287; PX 288; PX 289; PX 290; PX 291; PX 292; PX 293; PX 294; PX 295; PX 296; PX 297; PX 298; PX 299). But, virtually every time, Deputy Wilkinson's account was not seriously questioned, and the claims against Deputy Wilkinson were summarily rejected by those charged with the responsibility of overseeing, supervising, and disciplining him. (*See* PX 297).

The record shows that seven complaints were filed against Deputy Wilkinson. (DX 110 at IAD 14133). Four of these complaints were listed in a report Craig Thomas submitted to the Administrative Review Board during his investigation of the Harrison shooting. (Dkt. No. 537 at 8). But neither Thomas nor the Administrative Review Board bothered to look

at the IAD files relating to these complaints. (Dkt. No. 537 at 10, 15).

One of the complaints listed in Thomas's report was for an assault against a black motorist. (DX 110 at IAD 14134). Deputy Wilkinson used racial epithets during the incident. (DX 110 at IAD 14134). But supervisors did not question his account of what happened, and the Administrative Review Board summarily rejected the complaint. (Dkt. No. 537 at 8).

Another complaint was for assault against residents of a home during a warrantless search. (DX 110 at IAD 14134). Thomas did not even investigate whether a complaint that Deputy Wilkinson broke into a house without a warrant was filed. (Dkt. No. 537 at 13).

Two of the complaints against Deputy Wilkinson, listed in Thomas's report, were for excessive force. (Dkt. No. 537 at 8). The first incident occurred on October 6, 2003. (Dkt. No. 563 at 212; PX 288). Deputy Wilkinson, while working at Wallisville Substation, handcuffed Bonifacio Juarez, a Hispanic man, to a jailhouse bench. (Dkt. No. 563 at 212-13; PX 288). In front of his supervisor, Deputy Wilkinson punched Juarez, with closed fists, multiple times in the head. (Dkt. No. 563 at 216, 219; PX 288). Juarez's only defense was to try to curl up in a ball. (Dkt. No. 563 at 216; PX 288). Afterwards, Juarez was left on the bench, with blood pooling on the ground below, while Deputy Wilkinson and his supervisor wrote

their version of what happened. (Dkt. No. 563 at 218-20; PX 288). Juarez was not taken to the hospital until about three hours after the beating. (Dkt. No. 563 at 218; PX 288). Deputy Wilkinson claimed that his actions were justified because Juarez was kicking him, even though Juarez was handcuffed to a bench and Deputy Wilkinson was not. (Dkt. No. 496 at 29-30; PX 288). Again, Deputy Wilkinson's account was never seriously questioned. He received no psychological counseling after this event. (Dkt. No. 496 at 31; PX 288). Based on the fact that the grand jury did not indict Deputy Wilkinson, the Administrative Review Board summarily denied the excessive force complaint. (Dkt. No. 537 at 9; PX 288).

The second excessive force incident occurred on May 7, 2004 – only eight days before Deputy Wilkinson shot Harrison. (Dkt. No. 537 at 14; PX 299). Deputy Wilkinson was working an extra job for Dillard's at Deerbrook Mall in Humble, Texas. (Dkt. No. 496 at 138; PX 299). After an alleged shoplifting incident at the store, Robert Barkley ran past Deputy Wilkinson and got into his car. (Dkt. No. 496 at 139; PX 299). Deputy Wilkinson shot into Barkley's vehicle two or three times. (Dkt. No. 496 at 140; PX 299). Deputy Wilkinson claimed that he needed to shoot Barkley because, otherwise, Barkley could have run him over with his car. (Dkt. No. 496 at 140; PX 299). Deputy Wilkinson's supervisors at the Harris County Sheriff's Office came to the scene. (Dkt. No. 496 at 6; PX 299). Afterwards, Deputy Wilkinson's supervisors then authorized him to be in a patrol vehicle within a

few days after the Barkley shooting. (Dkt. 497 at 5; PX 299). No documentation indicates that Deputy Wilkinson was evaluated psychologically before returning to the streets. (Dkt. No. 496 at 6; Dkt. No. 537 at 15; PX 299). Again, because Deputy Wilkinson's account was not seriously questioned and because the grand jury did not hand down an indictment related to the incident, the Administrative Review Board summarily rejected excessive force complaints. (Dkt. No. 537 at 9; PX 299).

In addition, others have attempted to file complaints against Deputy Wilkinson, but were not permitted to do so. Ronald Lynch was stopped, handcuffed, and put in the backseat of Deputy Wilkinson's patrol car on the side of the road. (Dkt. No. 496 at 34; PX 302; PX 506). When Lynch refused to give Deputy Wilkinson consent to search his car, Deputy Wilkinson responded by threatening Lynch with force if he did not give consent. (Dkt. No. 496 at 185; PX 302). Lynch never filed a formal complaint, however, because those at the substation would not take his excessive force complaint.[2] (Dkt. No. 566 at 183-84; PX 302).

Fortunately, Deputy Wilkinson is no longer a Harris County Deputy Sheriff. But this was not the result of all the excessive force complaints against

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[2] The district court ruled that the Lynch testimony was inadmissible. (Dkt. No. 566 at 182, 186-87). However, this relevant testimony should have reached the jury.

him. (Dkt. No. 496 at 32-33; PX 291; PX 308). Instead, Deputy Wilkinson was discharged after he pulled over a driver who owed a debt to his father-in-law. (Dkt. No. 496 at 32-33; PX 291; PX 308). During what he described as a routine traffic stop almost a year after the Harrison incident, Deputy Wilkinson took $400 in cash from LaFrance. (Dkt. No. 496 at 8-10; PX 291; PX 308). Despite this egregious conduct, the Harris County Sheriff's Office did not take steps to strip Deputy Wilkinson of his badge. (Dkt. No. 496 at 12). Deputy Wilkinson is still eligible to wear a badge again as a peace officer in the State of Texas. (Dkt. No. 496 at 12).

REASONS FOR GRANTING REVIEW

The sole basis for the Fifth Circuit Court of Appeals' decision was that the Harrison Family lacked "evidence that Wilkinson understood that it was the Sheriff's official policy only to cursorily investigate officer-involved shootings and consequently not to discipline for this conduct." App. at 10, 14. In suggesting that the Harrison Family relied exclusively on expert testimony to show knowledge, the Court of Appeals categorically rejected evidence from which a reasonable jury could determine Deputy Wilkinson had knowledge of the unconstitutional municipal policy. *See City of Canton v. Harris*, 489 U.S. 378, 391 (1989) (recognizing causation in a § 1983 case is a fact-intensive determination, committed to

the fact finder). This erroneous holding raises critical issues of national importance.

I. The Court of Appeals undermines this Court's decisions by holding that Deputy Wilkinson's knowledge of the Sheriff's official policy only to cursorily investigate excessive-force complaints could not be inferred from the prior investigations of excessive-force complaints against him where his supervisors did not investigate his account of the incidents.

Deputy Wilkinson's understanding that he would not be disciplined may be inferred from his experiences with excessive-force complaints. The Harrison Family introduced evidence that Deputy Wilkinson was extremely familiar with how excessive-force complaints were handled in the Harris County Sheriff's Office. After all, he had gone through the process on numerous occasions and his accounts of excessive-force incidents were never questioned. *See, e.g.*, (DX 111 (Wilkinson's account in *Juarez* case was not challenged in any meaningful way by Sheriff and Wilkinson was not disciplined)); DX 110 (Wilkinson's account in *Barkley* case was not challenged in any meaningful way by Sheriff and Wilkinson was not disciplined). And "investigation," according to the Sheriff's Office, was merely "to collect evidence, document where the evidence was from, and process evidence." (Dkt. No. 495 at 12; *see also* Dkt. No. 495 at 25-26 (recognizing no-bill closes file as to excessive

force)); (Dkt. No. 492 at 52-53) (recognizing no discipline for any case after no-bill).

Deputy Wilkinson had a well-known history of harassing and assaulting civilians while performing his duties as a Harris County Deputy Sheriff. Prior to the Harrison incident, Deputy Wilkinson had been accused of physically and verbally assaulting civilians on six separate occasions. One incident even happened while a supervisor watched. Yet, none of the complaints against Deputy Wilkinson were sustained by anyone reviewing the allegations. No discipline, additional training or reprimand of any kind was issued to Deputy Wilkinson. Thus, a reasonable jury could determine that Deputy Wilkinson knew that he was insulated from any meaningful investigation of excessive-force complaints.

This alone was sufficient to raise a triable issue that Deputy Wilkinson knew of the policy's existence. The Harrison Family was not required to have Deputy Wilkinson confess to knowing all aspects of the policy.[3] This Court explained that the causation

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[3] The district court treated the ratification and failure to supervise theories as independent claims. But, here, the allegation that Harris County officials knew of and approved his excessive use of force and failed to supervise subordinates are inextricably intertwined with the deliberate indifference argument. The Court of Appeals ignores this fact when it suggests that the Harrison Family abandoned their failure to supervise and ratification of claims. *See* App. at 5 n.1. Because Deputy Wilkinson's version of the facts were "manifestly indefensible,"

(Continued on following page)

requirement requires a plaintiff "to show that the municipality's indifference led directly to the very consequence that was so predictable." *Bryan County v. Brown*, 520 U.S. 397, 408 (1997). The custom or policy in question must be the "moving force" behind the constitutional violation, and there must be an "affirmative link" between the policy and the violation. *Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985). Proof that Deputy Wilkinson had gone through the excessive-force process within the Sheriff's Office is sufficient to raise a triable issue that Deputy Wilkinson knew of the policy to under-investigate excessive-force complaints. *See Black v. Stephens*, 662 F.2d 181, 190 (3d Cir. 1981) (finding civil rights plaintiff could show causation where city delayed internal disciplinary investigation of officer's conduct until underlying arrest resolved).

II. The Court of Appeals improperly discounted Deputy Wilkinson's knowledge of the Sheriff's official policy to delegate all responsibility for investigating excessive-force complaints to another entity.

The Sheriff's Office improperly delegates to the Harris County District Attorney's Office its responsibility of ensuring that its Deputy Sheriffs comply with constitutional requirements. (PX 12; PX 12.1).

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the supervisors were not at liberty to blindly accept his story. *See Coon v. Ledbetter*, 780 F.2d 1158, 1162 (5th Cir. 1986).

Other than collecting items gathered at the scene by other departments within the Harris County Sheriff's Office, the Administrative Review Board conducts no independent investigation into the question of whether the officer used excessive force. (Dkt. No. 498 at 11). Rather, Harris County Sheriff's Office officials sit back and wait to see if the grand jury hands down a criminal indictment against the Deputy Sheriff. (Dkt. No. 498 at 11). If a criminal indictment is not delivered, the investigation ends. If a criminal indictment is delivered, it continues. This process is administered under the criminal law standard by another state agency, the Harris County District Attorney's Office. (Dkt. No. 498 at 11). This delegation of investigative power is improper and Deputy Wilkinson's knowledge of it specifically led to the unconstitutional deprivation. *See Bordanaro v. McLeod*, 871 F.2d 1151, 1158 (1st Cir. 1989) ("[Officers] are required to do more than refrain from indictable conduct.").

From the second-in-command, all the way down to the rookies, deputies understood that the Harris County Sheriff's Office relies on the criminal grand jury to decide whether excessive force was used for criminal and civil purposes. (Dkt. Nos. 498 at 15; 566 at 173-81; 564 at 133-34). Investigator Thomas, with the internal affairs department, perhaps the person who should be most knowledgeable about the Office's policies, also shared the other deputies' understanding. (Dkt. No. 495 at 13-14). These instructions necessarily encouraged deadly force as long as it was not

criminally enforceable. The district court acknowledged that Deputy Wilkinson understood that the District Attorney would handle excessive-force complaints. App. at 42 n.37.

III. The Court of Appeals' holding would encourage government agencies to create policies to thwart civil rights plaintiffs.

Harris County's decision to utilize the grand jury process as a threshold for any independent investigation is certainly convenient for the county. Texas law prohibits the prosecutor and the grand jury from disclosing what was discussed behind closed doors. (Dkt. No. 493 at 41-42.) The entire process is shielded from the public, from the Administrative Review Board, and from any potential plaintiff in a civil rights suit arising from the officer's actions. There is no way of knowing what was provided to the Harris County District Attorney's Office or to the grand jury. This unconstitutional policy cloaks the entire process in a shroud of secrecy and makes a civil rights plaintiff's burden exceedingly difficult. *See Marchese v. Lucas*, 758 F.2d 181, 190 (6th Cir. 1985) (finding § 1983 liability where county sheriff kept no records or engaged in any "meaningful investigation").

The whole notion of civil rights law is grounded in the belief that public officials should be responsible for and accountable to their citizens. Civil rights laws are designed to ensure that the state, and people acting on the state's behalf, cannot exercise tyrannical

power. Indifferent law enforcement entities should not be rewarded for their failure to document and investigate complaints against their own officers involving constitutional violations of the rights of citizens they are charged with protecting. The public policy which led to the creation of the "policy or custom" requirement also supports relaxing a plaintiff's burden when, as here, the defendant creates a system to under-investigate officer-shooting complaints and shield from public view any incriminating evidence against the officer. If such policies could exist, governmental entities would undoubtedly be encouraged to protect their own. This, in turn, has a direct and lethal effect on "policy or custom" cases, leaving meritorious cases and injured plaintiffs without an ability to vindicate their constitutional rights.

CONCLUSION AND PRAYER FOR RELIEF

Harris County maintained, with deliberate indifference to the constitutional rights of its citizens, a wholly inadequate system of discipline for Deputy Sheriffs that virtually ignored instances of excessive force. Through acquiescence, omission, and purposeful neglect, it was the custom and policy of the Harris County Sheriff's Office to under-investigate officer-shooting incidents and systematically minimize citizen complaints of misconduct by only performing an independent investigation when a grand jury handed

down a criminal indictment against a law enforcement official. The inevitable result of these policies was the brutal killing of Hiji Harrison by Deputy Wilkinson, who was the subject of prior – but under-investigated – complaints of excessive use of force. This Deputy Sheriff worked in an environment where it was clear that there was no functioning disciplinary system for misconduct and no penalty for violating a citizen's constitutional rights. The facts presented are sufficient to allow a jury to infer Deputy Wilkinson's knowledge and to infer a straight line between Harris County's policies, customs, and practices of protecting its own, through its deliberate indifference of the consequences of that custom, to the death of Hiji Harrison on May 16, 2004.

The Harrison Family respectfully asks that this Court reverse the judgment of the Fifth Circuit Court of Appeals and remand this case back to the district court for a trial on the merits. Appellants also ask for all other relief to which they may be entitled.

Respectfully submitted,

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Attorneys for Petitioners

DATE: November 2, 2009

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-20725

JULIAN JAMES, Individually; DAPHNE BATES HARRISON, Individually and as Representative of the Estate of Hiji Eugene Harrison, Deceased, and as Next Friend of H.E.H. a Minor,

Plaintiffs-Appellants

v.

HARRIS COUNTY,

Defendant-Appellee

Appeal from the United States District Court for the Southern District of Texas

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(Filed Aug. 4, 2009)

Before JOLLY, SMITH and BENAVIDES, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

In this 42 U.S.C. § 1983 case, the plaintiffs seek to impose municipal liability on Harris County, Texas, for the death of their family relative who was killed by a deputy sheriff who was allegedly engaging in unconstitutional excessive force during an arrest.

They allege the County is liable for the deputy's unconstitutional acts under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), because the Harris County Sheriff's failure to thoroughly investigate officer-involved shootings created in the department an expectation of impunity for the use of excessive deadly force.

After a ten-day trial, the jury could not reach a verdict on the threshold issue, whether the deputy sheriff used excessive force. Instead of granting a new trial on the issue of excessive force, the district court granted judgment as a matter of law in favor of Harris County on the grounds that, irrespective of excessive force, the evidence was insufficient to establish the County's liability for Wilkinson's actions. Harrison's family appeals. After careful review of the evidence, we affirm.

I.

The underlying facts are disputed. The parties agree that on May 16, 2004, at approximately 1:20 a.m., Deputy Sheriff William Wilkinson stopped a vehicle driven by Hiji Harrison, and that during the course of that traffic stop Wilkinson shot Harrison once in the back and three times in the face. The parties disagree as to whether the shooting was excessive to Wilkinson's need to protect himself.

At trial Wilkinson testified that he stopped Harrison because he was speeding. According to Wilkinson, Harrison consented to a search of the vehicle.

During his search, Wilkinson found a pistol on the floor board. Leaving the pistol there, he returned to the patrol car, where he had secured Harrison, and told him that he was under arrest. Wilkinson instructed Harrison to turn around in the seat and extend his arms behind his back so that he could be handcuffed. Harrison complied initially, but after his first hand was cuffed, a struggle followed. Wilkinson testified that Harrison used his free hand to pull Wilkinson into the backseat, then began to "fish and grab" for a gun. Wilkinson testified that because he feared for his life, he shot Harrison in the back. Fearing Harrison would arise and come after him, Wilkinson shot him three more times in the face, and held him at gunpoint until backup arrived.

Harrison's family argued to the jury that this testimony was materially inconsistent with the evidence. They pointed out that although Wilkinson claimed Wilkinson shot Harrison while he was in the backseat of the patrol car, investigators recovered no gunpowder residue from the backseat, and the position of the shell casing suggested Wilkinson fired his gun while standing outside the car. The family also showed that Harrison's autopsy report indicated no bruising or other injury that would suggest a struggle.

The family argued that the County was liable for Wilkinson's actions because, they alleged, the Sheriff's failure to thoroughly investigate officer-involved shootings created in the department an expectation of impunity for the use of excessive deadly force. In

support, the family called experts to testify that a pattern of inadequate investigations reflected an unwritten policy of under-investigating officer-involved shootings. One of those experts, Dr. David A. Klinger, connected the inadequate investigations to subsequent officer shootings, opining that people at the "bottom of an organization" tend to break institutional rules if the rules are not enforced.

As we have noted, the trial lasted ten days. After the jury had heard the family's evidence, the County moved for judgment as a matter of law on the issue of its liability for Wilkinson's alleged actions. That motion was denied. In due course, the case was submitted to the jury which, after six days of deliberation, informed the court that it could not reach a verdict on the threshold issue, whether Wilkinson had used excessive force. The district court then granted the County's renewed motion for judgment as a matter of law, holding that, although the evidence was sufficient to establish that Wilkinson used excessive force, it was insufficient to establish the County's liability for Wilkinson's actions. The family appeals.

II.

At the outset we need to understand the precise theory of liability asserted against the County.[1] The

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[1] On appeal, the family does not reurge two theories of liability it urged below. The family had argued that the County

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arguments in the family's briefs are wide-ranging and the dots are not always connected, but the following salient points can be gleaned from the allegations: that the Sheriff inadequately investigates officer-involved shootings; that, after a cursory investigation, he then improperly delegates to the Harris County District Attorney's office the responsibility to investigate the conduct of the officers who were involved in shootings, with the tacit understanding that if no criminal indictment issues, the officer would not further be investigated or disciplined; that as a result of this improper "delegation," the Sheriff abdicated

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was liable for Wilkinson's actions because the Sheriff failed to supervise Wilkinson and, secondly, ratified Wilkinson's misconduct. The district court held that the evidence was insufficient to hold the County liable on the basis of either of those claims. Although the County has defended the district court's judgment on the failure to supervise and ratification claims in its briefs on appeal, the family has not appealed its ratification claim. The claim therefore has been abandoned. The family also has abandoned its failure to supervise claim; although their briefs allege troubling facts that they argue reflect the County's "practice of never disciplining Deputy Wilkinson," they cite no authority for failure to supervise liability, and indeed have not asked us to review that ruling. Accordingly, under Federal Rule of Appellate Procedure 28, we deem any argument as to the failure to supervise claim abandoned. *See* FED. R. APP. P. 28(a)(9)(A) (argument must contain "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies"); *Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993).

This is a suit against the County only, but because the County's liability is premised on the Sheriff's official actions we refer to the County and Sheriff interchangeably.

his responsibility to investigate to conclusion officer-involved shootings; that the Sheriff's hands-off approach created in the department the understanding that officers would be immune from discipline for the use of excessive deadly force; and, finally, that this understanding was the moving force causing Wilkinson's reckless use of deadly force on the night in question.

We understand the family's allegations, although multiple, to be aimed at a focused policy claim: that it was the Sheriff's official policy to forgo a thorough investigation of officer-involved shootings, and concomitantly to ignore whether officer discipline was required in these situations.

In granting the County's Rule 50 motion, Judge Atlas, in an extended and thoroughly considered opinion, assumed that the family's evidence was sufficient to establish the existence of this alleged official policy. The judge concluded, however, that there was no evidence that Wilkinson himself had personal knowledge of the alleged policy, nor that the alleged policy was so widely known that it created in the department an expectation of impunity for the use of excessive deadly force, and therefore the evidence was insufficient to establish that the alleged policy was the moving force behind Wilkinson's actions on the night in question.

III.

Before we review the district court's judgment, we will first set out the standard of review and provide an overview of the law applicable to § 1983 claims of municipal liability.

We review the district court's Rule 50 judgment *de novo,* viewing the evidence in the light most favorable to the non-moving party. *Anthony v. Chevron USA, Inc.*, 284 F.3d 578, 583 (5th Cir. 2002). Federal Rule of Civil Procedure 50(a) authorizes the entry of judgment as a matter of law "[i]f a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." In our review here we ask whether there is "a conflict in substantial evidence on each essential element" of the family's claim against the County such that a reasonable jury could find in their favor. *Anthony,* 284 F.3d at 583 (citation omitted).

The principles of municipal liability under § 1983 are well-established. A municipality is not liable under § 1983 on the theory of respondeat superior, *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 694 (1978), but instead only for acts that are directly attributable to it "through some official action or imprimatur." *Piotrowski v. City of Houston,* 237 F.3d 567, 578 (5th Cir. 2001). To hold a municipality liable under § 1983 for the misconduct of an employee, a plaintiff must show, in addition to a constitutional

violation, that an official policy promulgated by the municipality's policymaker was the moving force behind, or actual cause of, the constitutional injury. *Id.* The official policy itself must be unconstitutional or, if not, must have been adopted "with deliberate indifference to the known or obvious fact that such constitutional violations would result." *Johnson v. Deep East Tex. Reg'l Narcotics Trafficking Task Force,* 379 F.3d 293, 309 (5th Cir. 2004); *see also Piotrowski,* 237 F.3d at 579.

Official policy can arise in various forms. It usually exists in the form of written policy statements, ordinances, or regulations, but may also arise in the form of a widespread practice that is "so common and well-settled as to constitute a custom that fairly represents municipal policy." *Piotrowski,* 237 F.3d at 579 (quoting *Webster v. City of Houston,* 735 F.2d 838, 841 (5th Cir. 1984) (en banc)). A policy is official only "when it results from the decision or acquiescence of the municipal officer or body with 'final policymaking authority' over the subject matter of the offending policy." *Jett v. Dallas Indep. Sch. Dist.,* 491 U.S. 701, 737 (1989). Under Texas law, sheriffs are "final policymakers" in the area of law enforcement for the purposes of holding a county liable under § 1983. *Williams v. Kaufman County,* 352 F.3d 994, 1013 (5th Cir. 2003).

Although an official policy can render a municipality culpable, there can be no municipal liability unless it is the moving force behind the constitutional violation. *Piotrowski,* 237 F.3d at 580 ("In addition to

culpability, there must be a direct causal link between the municipal policy and the constitutional deprivation.") (citing *Monell,* 436 U.S. at 694). In other words, a plaintiff must show direct causation, i.e., that there was "a direct causal link" between the policy and the violation. *Id.*; *see also Johnson,* 379 F.3d at 310 (quoting *Fraire v. City of Arlington,* 957 F.2d 1268, 1281 (5th Cir. 1992) ("must be more than a mere 'but for' ")).

A plaintiff must also show that, where the official policy itself is not facially unconstitutional, it was adopted "with 'deliberate indifference' as to its known or obvious consequences.' " *Johnson,* 379 F.3d at 309; *see also Piotrowski,* 237 F.3d at 579. Deliberate indifference is a degree of culpability beyond mere negligence or even gross negligence; it "must amount to an intentional choice, not merely an unintentionally negligent oversight." *Rhyne v. Henderson County,* 973 F.2d 386, 392 (5th Cir. 1992); *see also Conner v. Travis County,* 209 F.3d 794, 796 (5th Cir. 2000).

Of the moving force and deliberate indifference elements of municipal liability, we have stressed: "These requirements must not be diluted, for '[w]here a court fails to adhere to rigorous requirements of culpability and causation, municipal liability collapses into respondeat superior liability.' " *Snyder v. Trepagnier,* 142 F.3d 791, 796 (5th Cir. 1998) (quoting *Bd. of County Comm'rs of Bryan County, Okl. v. Brown,* 520 U.S. 397 (1997)).

Like the district court, we will assume a constitutional violation and an official policy; that is, for purposes of our decision today, we assume that Wilkinson used excessive force, and that it was the Sheriff's official policy to cede a thorough investigation of officer-involved shootings to the District Attorney, and correspondingly to abstain from further officer discipline in such cases. We also assume, for the purposes of this appeal, that the alleged policy was adopted with deliberate indifference to its known or obvious consequences, that is, that it would spawn reckless police arrests in violation of the Constitution. Therefore the only question we will decide is whether, on the basis of the evidence presented, viewed in the light most favorable to the family, a reasonable jury could find the alleged policy was the moving force behind Wilkinson's actions. We conclude that it could not.

IV.

Because we assume the existence of an official policy, we look only for evidence to directly connect, or causally link, that policy to Wilkinson's conduct on the night in question. To show that the alleged policy was the moving force behind Wilkinson's use of excessive force, the family was required, at a minimum, to adduce evidence that Wilkinson understood that it was the Sheriff's official policy only to cursorily investigate officer-involved shootings and consequently not to discipline for this conduct.

Wilkinson testified only that he was aware that at some point in these matters the District Attorney investigated officer-involved shootings; his testimony, however, went no further.[2] He did not indicate that he was aware that the Sheriff abandoned further investigation and discipline for officer-involved shootings. Thus, nothing in Wilkinson's own testimony suggested his actual personal knowledge of the Sheriff's policy (a policy which the family has alleged and we have assumed), of pretermitting a thorough investigation and discipline in officer-involved shootings.

Thus, to show that the policy was the cause of Wilkinson's use of excessive force, the family was required to establish Wilkinson's knowledge of the policy through other means. To that end, the family sought to establish that a policy of not conducting a thorough investigation of officer-involved shootings was so widely known that it created in the department an expectation of impunity for the use of excessive deadly force, and Wilkinson's personal knowledge reasonably could be assumed. To establish that the policy was widely known, the family relied exclusively on the expert testimony from Dr. David A. Klinger, a criminologist, that line officers tend to break institutional rules if they are not enforced. Dr. Klinger testified that of the 36 investigations of Harris

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[2] The only policy asserted by the family that the Sheriff acknowledges is that officer-involved shootings were ultimately turned over to the District Attorney for his review and appropriate handling.

County officer-involved shootings he personally reviewed, a "substantial number" fell below investigatory standards. He then sought to connect those substandard investigations to subsequent officer unjustified shootings by opining that established sociological theory suggested that informal networks of communication serve to inform people at the "bottom of the organization" of what kinds of conduct are permissible. Dr. Klinger's testimony thus sought to establish that the department's deputies would have known that the use of deadly force was not thoroughly investigated and disciplined and, consistent with his theory, would have broken rules governing the use of force.

The family argues that on the basis of Dr. Klinger's testimony, a reasonable jury could find that a policy of avoiding thorough investigation of officer-involved shootings was so widely known among the department's deputies that Wilkinson's personal knowledge of the policy could be assumed. After a thorough review, we do not find that this testimony supplies the direct causal link to Wilkinson's use of excessive force, because it simply does not connect Dr. Klinger's general theory to Wilkinson's knowledge that the Sheriff had a lax investigation and discipline policy.

The district court accepted Dr. Klinger's expert testimony to the extent it sought to establish that, generally, line workers will break rules if they are not enforced. But the district court expressly forbade Dr. Klinger from opining that Wilkinson had knowledge

of the alleged policy, on the grounds that there was no evidence from which this fact could be established. The district court further rejected Dr. Klinger's testimony to the extent that it concluded that the alleged policy was widely known among the department's deputies; it reasoned that Dr. Klinger had failed to offer any empirical evidence relating to the Harris County Sheriff's Department that could connect his general theory to the facts of this case. That is to say, no evidence was offered from which it properly could be inferred that it was common knowledge in the Sheriff's Department, through "informal networks of communication" (to use the expert's words), that the Sheriff's investigation and discipline for officer-involved shootings was lax.

"District courts enjoy wide latitude in determining the admissibility of expert testimony, and the discretion of the trial judge and his or her decision will not be disturbed on appeal unless manifestly erroneous." *Watkins v. Telsmith Inc.*, 121 F.3d 984, 988 (5th Cir. 1997). We review a district court's rejection of expert testimony for abuse of discretion. *See, e.g., United States v. Wofford*, 560 F.3d 341, 346 (5th Cir. 2009). The record supports the district court's conclusion that Dr. Klinger offered no empirical evidence to connect his general theory to the Harris County Sheriff's Department; he never interviewed the department's deputies nor otherwise sought to collect evidence that might reveal whether informal networks of communication operated within the department. The district court did not abuse its

discretion in rejecting those portions of Dr. Klinger's testimony that the alleged policy was widely known.

We conclude by holding that Dr. Klinger's general testimony simply does not supply the direct causal link between the alleged policy and Wilkinson's alleged use of excessive force. A reasonable jury could not find that the alleged policy was the moving force behind Wilkinson's alleged excessive force, when there was no evidence that Wilkinson had knowledge of such policy.

V.

Having concluded that the family's evidence failed to satisfy an essential element of municipal liability, we agree with the district court that the County was not liable for Wilkinson's conduct. The district court's judgment is therefore

AFFIRMED.

508 F.Supp.2d 535

United States District Court,
S.D. Texas,
Houston Division.
Julian JAMES, et al., Plaintiffs,
v.
HARRIS COUNTY, Defendant.
Civil Action No. H-04-3576.

Aug. 20, 2007.

Benjamin L. Hall, III, Elizabeth B. Hawkins, The Hall Law Firm LLP, Brian Weil Zimmerman, David Michael Scott, Zimmerman Azelrad et al., Houston, TX, for Plaintiffs.

George Andrew Nachtigall, Mary E. Baker, Houston, TX, Michael Paul Fleming, Attorney at Law, Conroe, TX, for Defendant.

MEMORANDUM AND ORDER

ATLAS, District Judge.

Pending before the Court in this civil rights action are cross-Motions for Judgment as a Matter of Law filed by Defendant Harris County (the "County's Motion") [Doc. # 485][1] and Plaintiffs ("Plaintiffs'

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[1] The Court considers the County's Motion to include its supplement [Doc. # 507]. Briefing on the Motion includes a response filed by all Plaintiffs ("Plaintiffs' Response") [Doc. # 510] and the County's reply [Doc. # 522].

Motion") [Doc. # 508],[2] as well as a separate Motion for Judgment as a Matter of Law filed by Plaintiff Julian James (the "James Motion") [Doc. # 524].[3] The County seeks judgment as a matter of law on all Plaintiffs' claims. Upon a careful review of the evidence admitted at trial, all applicable law, and the parties' briefing on each motion, the Court concludes that Defendant Harris County's Motion for Judgment as a Matter of Law should be **granted**. Plaintiffs' Motion and the James Motion are **denied**.

I. *FACTUAL AND LEGAL BACKGROUND*

The Court briefly summarizes the facts of this case, which are set out in full detail in the trial record. On May 16, 2004, at approximately 1:20 a.m., Harris County Deputy Sheriff William Wilkinson ("Wilkinson") stopped a vehicle driven by Hiji Harrison ("Harrison"). The sequence of events that

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[2] Plaintiffs' legal arguments on their Motion are presented in their Memorandum of Law and Argument in Support of Plaintiffs' Response to Defendant Harris County's Motion for Judgment as a Matter of Law and Plaintiffs' Rule 50 Motion for Judgment as a Matter of Law ("Plaintiffs' Mem.") [Doc. # 519]. Briefing on Plaintiffs' Joint Motion includes Defendant's Objections [Doc. # 521], a "Sur-Reply to Defendants' Objections, Reply and Responses Filed in Opposition to Plaintiffs' Motion for Judgment and 'Renewed' Motion for Judgment," filed by all Plaintiffs [Doc. # 523], and a surreply to that document by Defendants [Doc. # 528].

[3] Defendant responded [Doc. # 526] to the James Motion, and James replied [Doc. # 527]. The surreply [Doc. # 528] to Plaintiffs' Motion is also a surreply to the James Motion.

followed is hotly contested, but the parties agree that it ended with Wilkinson shooting and killing Harrison. The Internal Affairs Department ("IAD") of the Harris County Sheriff's Office ("HCSO")[4] determined that Wilkinson did not breach any departmental policy, practice, or procedure.

Plaintiffs are Harrison's mother, wife, and minor child. They have sued Defendant Harris County[5] pursuant to 42 U.S.C. §§ 1983, 1988, alleging violations of Harrison's rights under the Fourth, Eighth, and Fourteenth Amendments to the United States Constitution. After a 10-day trial, the jury deliberated for six days before informing the Court that it had reached "an unresolvable impasse" and was unable to reach a verdict.[6]

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[4] The parties consistently refer to the Sheriff's Office as the "Harris County Sheriff's Department." However, the Court adopts the moniker of the official Sheriff's Office website.

[5] Plaintiffs originally sued the Harris County Sheriff's Department and Wilkinson. *See* Plaintiffs' Original Complaint, at 1. The Court granted Wilkinson's Motion for Summary Judgment after the Plaintiffs' Third Amended Complaint made it plain that he had been sued only in his official capacity, making his presence superfluous to that of the HCSO. *See* Memorandum and Order of June 16, 2006 [Doc. # 241], at 1-2.

[6] *See* Jury Note 10 [Doc. # 488-3]; Minute Entry Order of February 13, 2007 [Doc. # 488]. The jury could not agree on the first and predicate issue – whether Wilkinson had used excessive force – and did not reach the other issues.

II. *JUDGMENT AS A MATTER OF LAW – LEGAL STANDARDS*

The Federal Rules of Civil Procedure provide for judgment as a matter of law where a party, having been fully heard on an issue by a jury, has not established a "legally sufficient evidentiary basis" for its claim or defense, such that no "reasonable jury" could find for that party on that issue. FED. R. CIV. P. 50(a) (1). A motion for judgment as a matter of law under Rule 50(a) "must specify the judgment sought and the law and facts that entitle the movant to the judgment," and must be made *before* the case is actually submitted to the jury. FED. R. CIV. P. 50(a)(2).

If the court does not grant a party's Rule 50(a) motion during trial, the matter is deemed submitted to the jury "subject to the court's later deciding the legal questions raised by the motion." FED. R. CIV. P. 50(b). When no verdict is reached by the jury, a movant who properly made the motion during trial may renew its motion post-trial under Rule 50(b), but must do so no later than ten days after the jury is discharged.[7] *Id.* A proper Rule 50(a) motion, made before the case is submitted to the jury, is a prerequisite to a post-trial Rule 50(b) motion. *See United States for use of Wallace v. Flintco Inc.*, 143 F.3d 955, 963 (5th Cir.1998) (motion under Rule 50(a) is

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[7] When there is a verdict, the movant must renew the motion within ten days of the entry of judgment. *See id.*

required "to alert [nonmovant] to the specific grounds for an anticipated challenge to the sufficiency of its proof and to allow [nonmovant] the opportunity to move to cure any such deficiency"). The Rule 50(a) motion controls the breadth of a subsequent Rule 50(b) motion, as well. A matter not broached by the Rule 50(a) motion may not be subsequently raised under Rule 50(b). *See Arsement v. Spinnaker Exploration Co., LLC,* 400 F.3d 238, 247 (5th Cir.2005); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.,* 188 F.3d 278, 284 n. 5 (5th Cir.1999). If there was no verdict at trial, as is the case here, a court granting a Rule 50(b) motion may grant a new trial, or "direct entry of judgment as a matter of law" if no reasonable jury could have found in favor of the nonmovant on the basis of the evidence at trial. FED. R. CIV. P. 50(b)(2)(B).

III. *SECTION 1983 CLAIMS AND ELEMENTS IN ISSUE*

As a local government unit, Harris County is subject to liability under § 1983 if it committed a constitutional tort through a "policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *City of St. Louis v. Praprotnik,* 485 U.S. 112, 121, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988) (quoting *Monell v. Dept. of Social Svcs. of City of New York,* 436 U.S. 658, 690, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)). Liability may be imposed on a county "only for acts for which the [county] itself is actually responsible, 'that is, acts which the

[county] has officially sanctioned or ordered.'" *Praprotnik,* 485 U.S. at 123, 108 S.Ct. 915 (quoting *Pembaur v. Cincinnati,* 475 U.S. 469, 480, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986)). Because the case proceeded to trial against the County, and not Wilkinson in an individual capacity, the Court must be careful not to collapse municipal liability into *respondeat superior* liability by failing to adhere to the rigorous requirements of municipal "culpability and causation." *See Snyder v. Trepagnier,* 142 F.3d 791, 796 (5th Cir.1998); *Bd. of Comm'rs of Bryan County v. Brown,* 520 U.S. 397, 415, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997).

To meet the requirements for a § 1983 claim at trial, Plaintiffs were required to prove (1) an official policy or custom, of which (2) a final policymaker can be charged with actual or constructive knowledge, and (3) a constitutional violation[8] whose "moving force" is that policy or custom. *Pineda v. City of Houston,* 291 F.3d 325, 328 (5th Cir.2002); *Piotrowski v. City of Houston,* 237 F.3d 567, 578 (5th Cir.2001); *James v. Harris County,* No. 04-3576, 2006 WL 2827050, *7 (S.D.Tex. Sept. 28, 2006).

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[8] The fact that Harrison was killed, while tragic, is not in and of itself a violation of Harrison's rights. Plaintiffs were required to prove that the shooting was a constitutional injury, namely, that it was an unjustified act of objectively unreasonable force, excessive to Wilkinson's need to protect himself, and was the direct and sole cause of some injury. *See Goodson v. City of Corpus Christi,* 202 F.3d 730, 740 (5th Cir.2000).

There must be a formal or informal policy of the municipality. *See Snyder,* 142 F.3d at 798 (citing *Rodriguez v. Avita,* 871 F.2d 552, 554-55 (5th Cir.1989)). An official policy may be proven with "[a] policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority." *Webster v. City of Houston,* 735 F.2d 838, 841. Where there is no official adoption or authorization, a municipal policy may be shown by a custom that is "a persistent, widespread practice of City officials or employees . . . so common and well-settled as to constitute a custom that fairly represents municipal policy." *Webster,* 735 F.2d at 841; *Piotrowski,* 237 F.3d at 579. Accordingly, an apparently unofficial policy may be evidence of an unwritten or unarticulated official policy. Plaintiffs may not show a policy through mere proof of isolated or random incidents. *See Piotrowski,* 237 F.3d at 578 (citing *Bennett v. City of Slidell,* 728 F.2d 762, 768 n. 3 (5th Cir.1984)).

Proof of the existence of a policy or custom is insufficient to sustain § 1983 liability without actual or constructive knowledge of that policy on the part of a policymaker. Showing constructive knowledge of a municipal custom requires "evidence that the incidents were the 'subject of prolonged public discussion or of a high degree of publicity.'" *Pineda,* 291 F.3d at 328 (citing *McConney v. City of Houston,* 863 F.2d 1180, 1184 (5th Cir.1989)).

In addition to proof of an official custom or policy that is known to the policymaker, Plaintiffs also needed to prove that the HCSO's alleged custom or policy was the "moving force" behind the constitutional injury. To show moving force, Plaintiffs were required to "demonstrate a direct causal link between the municipal action and the deprivation of federal rights." *Brown,* 520 U.S. at 404, 117 S.Ct. 1382; *see also Fraire v. City of Arlington,* 957 F.2d 1268, 1281 (5th Cir.1992) ("a direct causal connection must exist between the policy and the alleged constitutional deprivation"). "To adopt lesser standards of fault and causation would open municipalities to unprecedented liability under § 1983." *City of Canton v. Harris,* 489 U.S. 378, 391, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989). Moving force is not "a mere but for coupling between cause and effect." *Fraire,* 957 F.2d at 1281 (citing *City of Canton,* 489 U.S. at 388-89, 109 S.Ct. 1197). Merely showing that correcting the allegedly deficient policy would have *prevented* the claimed constitutional injury is therefore not sufficient to meet Plaintiffs' burden. *See Estate of Davis ex rel. McCully v. City of North Richland Hills,* 406 F.3d 375, 386 (5th Cir.2005). The "municipal policy must be *affirmatively* linked to the constitutional violation." *Fraire,* 957 F.2d at 1281 (emphasis added) (citing *Polk County v. Dodson,* 454 U.S. 312, 326, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981)).

Even if a municipal policy is the moving force behind a constitutional injury resulting from excessive force, Plaintiffs cannot recover from the County

under § 1983 without proof "either (1) that the policy itself violated federal law or authorized or directed the deprivation of federal rights or (2) that the policy was adopted or maintained by the municipality's policymakers 'with "deliberate indifference" as to its known or obvious consequences.'" *Johnson v. Deep East Texas Regional Narcotics Trafficking Task Force,* 379 F.3d 293, 309 (5th Cir.2004) (citing *Brown*, 520 U.S. at 397, 117 S.Ct. 1382); *see Piotrowski,* 237 F.3d at 579 ("even a facially innocuous policy will support liability if it was promulgated with deliberate indifference to the 'known or obvious consequences' that constitutional violations would result"). Proof of "[d]eliberate indifference ... is a stringent test," *Piotrowski,* 237 F.3d at 579, and a municipality is not deliberately indifferent to the consequences of its policies merely through negligence, even if that negligence is gross. *See City of Canton,* 489 U.S. at 388-89, 109 S.Ct. 1197; *Piotrowski*, 237 F.3d at 579. To support liability under § 1983, the policy must be deliberate, and that is the case "'where – and only where – a deliberate choice to follow a course of action is made from among various alternatives' by city policymakers." *Id.* at 389, 109 S.Ct. 1197 (citing *Pembaur,* 475 U.S. at 483-84, 106 S.Ct. 1292). In order to show deliberate indifference, Plaintiffs were required to show, for instance, "more than a single instance of the lack of training or supervision causing a violation of constitutional rights." *Thompson v.*

Upshur County, 245 F.3d 447, 459 (5th Cir.2001). "The plaintiff must generally demonstrate at least a pattern of similar violations."[9] *Id.*

To prevail, in summary, Plaintiffs were required to present evidence sufficient to allow a reasonable jury to find that there was a municipal policy, of which a policymaker was actually or constructively aware, that was the moving force behind Harrison's constitutional injury. Plaintiffs were additionally required to prove that the County – through the HCSO – deliberately adopted that policy and was indifferent to its "known or obvious consequences" to the constitutional violations likely to result from the policy. *Johnson*, 379 F.3d at 309.

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[9] There is an exception that allows a plaintiff to show indifference by "showing a single incident with proof of the possibility of recurring situations that present an obvious potential for violation of constitutional rights and the need for [a prophylactic policy]." *McClendon v. City of Columbia*, 258 F.3d 432, 442 (5th Cir.2001); *see Burge v. St. Tammany Parish*, 336 F.3d 363, 373 (5th Cir.2003). The single-incident exception is "narrow," however, and it is a doctrine that the court of appeals has "been reluctant to expand." *Burge*, 336 F.3d at 373 (citing *Pineda*, 291 F.3d at 334-35). The exception applies "only where the facts giving rise to the violation are such that it should have been apparent to the policymaker that a constitutional violation was the highly predictable consequence of a particular policy or failure to train." *Id.* (citing *Brown v. Bryan County, OK*, 219 F.3d 450, 461 (5th Cir.2000)).

IV. *ANALYSIS*

Overview. – At trial, the parties aggressively contested the issue of whether Wilkinson used excessive force. The jury could not reach a unanimous verdict on this question. The Court concludes that a reasonable jury could have found in Plaintiffs' favor on this element, based on the evidence produced at trial. Plaintiffs acknowledged at trial and do not now deny that the HCSO had a policy prohibiting use of excessive force.[10] Rather, Plaintiffs contend that the HCSO had a custom and practice of permitting deputies' use of excessive force against the public by (i) inadequately investigating officer-involved shootings (the "under-investigation theory"); (ii) relying for serious administrative sanctions of deputies on the outcome of the HCSO's referral of the incidents to the Harris County District Attorney's Office for presentation to a grand jury (the "delegation theory")[11]; and

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[10] The County excerpted its official policy on the use of force in an affidavit: "**Conduct in Making Arrests or Towards a Prisoner:** Each Deputy must be firm, resolute and zealous in effecting arrests. When it becomes necessary to use force in making an arrest or restraining a prisoner, the Deputy shall use only that degree of force necessary under the circumstances." Affidavit of Major T.G. Enloe, Exhibit A to Motion for Summary Judgment [Doc. # 263], at 4 (boldface original) (citing Department Manual, Chapter II, Section 1.3(B) ("General Rules of Conduct")). The Department Manual itself is not in the record.

[11] "[D]efendant's use of a criminal law review process . . . erects an unconstitutional review process that permits the use of deadly force as long as such force cannot be shown to be criminal or excessive under criminal law standards." Plaintiffs' Mem., at 4.

(iii) inadequately supervising Wilkinson (the "failure to supervise theory").[12] Plaintiffs thus combine an excessive force claim with one or more alleged HCSO practices or customs. Plaintiffs also assert a ratification theory, which if proven, would allow Plaintiffs to establish municipal liability in the absence of a pre-existing policy or custom where the municipality gave knowing *post hoc* approval of the conduct leading to the alleged harm.

For their formal and informal policy theories, Plaintiffs were required to present at trial not only evidence that the alleged policy existed, but that it was the moving force behind the specific constitutional harm alleged in this case, and proof that the policy was adopted with deliberate indifference to the potential constitutional harms it would cause. Plaintiffs did not present sufficient evidence to allow a reasonable jury to find in their favor on all the § 1983 elements under any theory of municipal liability. Even where the Court presumes *arguendo* that Wilkinson's use of deadly force was excessive to the need he faced, Plaintiffs failed on each theory to meet the "moving force" and "deliberate indifference" tests. Plaintiffs also did not adduce evidence sufficient to

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[12] The County's evidence established that the HCSO had an internal procedure for evaluating whether officers violated technical, ministerial or objectively verifiable regulations such as failing to wear a badge or uniform, or failing to keep a weapons license current. These types of violations are not at issue.

support a reasonable jury's verdict on the failure to supervise or the ratification theories.

A. *Policy, Custom, or Practice Theories*

Use of Excessive Force. – At its core, and put in the light most favorable to Plaintiffs, Plaintiffs' primary custom and practice theory is that the HCSO customarily permitted officers' widespread use of excessive force by adopting the practice of failing to sanction deputies who use excessive force in officer-involved shootings. Plaintiffs contend that this custom of implicitly permitting the use of excessive force caused Wilkinson to do so against Harrison.[13]

To the extent that Plaintiffs claim the HCSO's objectionable custom is permitting unjustified officer-involved shootings *per se* – as opposed to the theory that the practice of use of excessive force was attributable to an extrinsic related custom, such as allegedly inadequate investigations – the claim fails as a matter of law on the trial record presented by Plaintiffs.[14]

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[13] To some extent, Plaintiffs' theory implies the County was negligent or grossly negligent. There is no actionable § 1983 claim under such a theory. *See Campbell v. City of San Antonio,* 43 F.3d 973, 977 (5th Cir.1995); *Fraire,* 957 F.2d at 1276; *Herrera v. Millsap,* 862 F.2d 1157, 1160 (5th Cir.1989); *Simmons v. McElveen,* 846 F.2d 337, 339 (5th Cir.1988).

[14] It is unclear if Plaintiffs also contend the custom was use of excessive force generally. Because Plaintiffs' experts refer only to officer-involved shootings, the Court focuses its analysis on those types of incidents.

Plaintiffs did not present evidence that the HCSO's officer-involved shootings prior to Harrison's were in fact unjustified or excessive to the needs faced by the deputies involved. Without such evidence, there is no evidentiary basis for finding that the HCSO had a custom or practice of such shootings. Plaintiffs' two expert witnesses, respectively, gave opinions on 36 and 38 officer-involved shootings within the HCSO over a two-and-a-half year period.[15] Each expert lodged criticisms about less than two-thirds of the investigations, but opined generally that the incidents may

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[15] David Klinger, one of Plaintiffs' expert witnesses, testified that he "reviewed 36 Internal Affairs investigative case files from Harris County regarding officer involved or deputy involved shootings that occurred between the year 2002 and the year 2004, stopping with the Hiji Harrison shooting." Transcript of Testimony of David Klinger, January 26, 2007 ("Klinger Tr.") [Doc. # 500], at 10, 72. These reports were drawn from "the whole universe of cases for 2002, 2003, and 2004 up to the Hiji Harrison incident," including non-fatal incidents. *Id.* at 25. Plaintiffs' other expert, Robert Keppel, examined the investigative reports for 38 officer-involved shootings from the same period. Transcript of Testimony of Robert Keppel, January 29, 2007 ("Keppel Tr.") [Doc. # 503], at 13, 73-74. Many were not fatalities, and in two of the incidents, there were no physical injuries. *Id.* at 113; Plaintiffs' Exhibit ("PX") 410, *passim*. Three of the investigations that he found to be substandard actually were performed by the Houston Police Department, not the HCSO, although Dr. Keppel opined that the HCSO bore ultimate responsibility for the weaknesses in those investigations. *Id.* at 113. For ease of reference, the Court assumes Plaintiffs' experts reviewed the same 38 pre-Harrison officer-involved shooting incidents.

have involved the use of excessive force.[16] Plaintiffs presented no evidence that any of those incidents in fact involved an unjustified use of force. Rather, Plaintiffs rested on their experts' opinions that the HCSO inadequately investigated the shootings and on the legal argument that the HCSO improperly relied on the district attorney's presentation of the matter to the grand jury for a decision whether to sanction a deputy.[17] Intentional inadequate forensic investigation and improper delegation of disciplinary decision-making are not substitutes for, and do not permit the jury to find, that any specific incident involved the use of unconstitutional excessive force. Plaintiffs' evidence is insufficient to demonstrate a

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[16] *See* Keppel Tr., at 45; Klinger Tr., at 72. Plaintiffs' experts' suspicions of the use of unjustified force are not admissible evidence. *See General Elec. Co. v. Joiner,* 522 U.S. 136, 145, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997) ("[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert."); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); *Michaels v. Avitech, Inc.*, 202 F.3d 746, 754 (5th Cir.2000).

[17] *See* Harris County Motion [Doc. # 485], at 6-7. Plaintiffs' experts testified to various investigative omissions in many (but not all) of the IAD files, *see* Keppel Tr., at 16; Klinger Tr., at 74-84. Keppel believed the under-investigation was intentional. Keppel Tr., at 69. The experts did not explain if these omissions were material to the disposition of the incident for administrative, civil, or criminal purposes.

persistent, widespread custom of use of excessive force. *See Pineda,* 291 F.3d at 325.[18]

A comparison to the evidence in *Pineda v. City of Houston* is instructive. In *Pineda*, a sample of 500 searches involving narcotics was excerpted from more than 5,000 offense reports produced by City of Houston in discovery. *Id.* The district court held, on the basis of eleven of these searches, that there was a question of material fact as to whether the City had a custom of unconstitutional searches. *Id.* The Court of

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[18] If Plaintiffs seek to rely on an excessive force theory not limited to officer-involved shootings, the theory fails. Plaintiffs did not present evidence of a sufficient number of such incidents to support a jury finding that there was a persistent and widespread pattern under the circumstances presented. The HCSO is a large department – Chief Deputy Michael Smith testified that the HCSO is the third-largest sheriff's department in the United States. Transcript of Testimony of Michael Smith, January 29, 2007 ("Smith Tr.") [Doc. # 498], at 33. In 2004, the year of Harrison's death, Harris County reported 2,547 commissioned personnel in the Sheriff's Office, including roughly 850 "patrol deputies." TEXAS CRIME REPORT FOR 2004 ("2004 Crime Report"), Texas Department of Public Safety, at 74 (available at www.txdps.state.tx.us/administration/crime_records/pages/crimestatistics.htm). The Court takes judicial notice of this fact, which is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." FED. R. EV. 201(b). Chief Deputy Smith testified that at the time of trial, the HCSO employed 3,500 deputies. Smith Tr., at 38. The HCSO performed well over 6,900 arrests that year. 2004 Crime Report, at 148. The Department of Public Safety reported 6,912 arrests for indexed crimes (murder, rape, robbery, aggravated assault, burglary and larceny). The total number of arrests was not reported. *Id.*

Appeals disagreed, concluding that the extrapolation was unsupported by the evidence, partially "because the sample of alleged unconstitutional events is just too small." *Id.* ("Eleven incidents each ultimately offering equivocal evidence of compliance with the Fourth Amendment cannot support a pattern of illegality in one of the Nation's largest cities and police forces."). Here, if the Court deems the 38 officer-involved shooting incidents to be analogous to the sample of 500 searches in *Pineda,* then the eleven allegedly unconstitutional searches in *Pineda* should be compared to officer-involved shootings prior to Harrison that involved use of excessive force. Plaintiffs presented no evidence that *any* of those incidents met this criterion. Plaintiffs' evidence therefore is weaker than that which failed in *Pineda.* Thus, Plaintiffs submitted insufficient evidence to support a jury verdict that the HCSO had a *per se* policy or custom of deputies' use of excessive force or deadly force.[19]

Under-Investigation of Officer-Involved Shootings by HCSO. – Plaintiffs theorize that the HCSO adopted a policy or custom of intentionally forensically under-investigating officer-involved shootings

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[19] Plaintiffs also have not demonstrated under this theory that the HCSO policymaker actually knew or had constructive knowledge of any alleged sanctioned custom or practice of use of excessive force by deputies, in officer-involved shootings or otherwise.

(the "under-investigation theory").[20] Plaintiffs' first expert, Robert D. Keppel, who holds a multi-disciplinary Ph.D. in criminal justice,[21] opined that fourteen of the 38 officer-involved shooting investigation files "flunked" in that they did not pass muster under the National Sheriff's Association, the International Association of Chiefs of Police ("IACP"), and textbooks' standards, and did not in his opinion meet HCSO's own standards.[22] He deemed nine of the HCSO investigations questionable, because they each had one flaw but were otherwise "good." He did not rate the rest of the investigations.[23] He believed the investigations he reviewed were intentionally inadequate in that the HCSO homicide investigations knew how to do more thorough investigations.[24]

Plaintiffs' second expert, David A. Klinger, who holds a Ph.D. in sociology, opined that the investigative

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[20] This theory is distinct from but implicitly a predicate for Plaintiffs' arguments criticizing HCSO's delegation of the administrative discipline decisions in officer-involved shootings to the District Attorney and grand jury.

[21] Dr. Keppel testified that his degree involved comprehensive study and examinations in "sociology, psychology, psychiatry, anthropology, dentistry, pathology and law." Keppel Tr., at 9.

[22] *Id.* at 74. He did not give any opinion on how the investigations rated under the state-mandated standards of the Texas Commission on Law Enforcement Officer Standards and Education. *Id.* at 71.

[23] *Id.* at 73-74.

[24] *Id.* at 44, 47.

practices in a "substantial number" of the 36 cases he reviewed were below the aspirational standards of the IACP, that the HCSO homicide detectives gave undue credence to deputies' explanations of the events, and there was a failure to develop key points about the events. Dr. Klinger opined that "[t]he custom and practice of the Harris County Sheriff's Department is to conduct incomplete and inadequate investigations of shootings involving their deputies."[25] Dr. Klinger admitted, however, that not all the files had issues and did not know if he reviewed the entire homicide and IAD file in each instance.[26] Dr. Klinger also opined that people at the "bottom of an organization" tend to break institutional rules if the rules are not enforced.[27] Dr. Klinger acknowledged that most shootings by law enforcement officers are found to be justified, and he does not criticize the HCSO merely because the shootings were found to be justified.[28]

To prevail on their § 1983 claim against the County, as noted above, Plaintiffs had to adduce evidence of the existence of a custom; that the policymaker actually or constructively knew of the custom; that the custom was the moving force behind a constitutional injury; and that the HCSO, in adopting

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[25] Klinger Tr., at 85.

[26] *Id.* at 134.

[27] *Id.* at 71.

[28] *Id.* at 92.

the custom, was deliberately indifferent to the risk that constitutional injuries would result from the policy.

The Court assumes for purposes here that Plaintiffs presented sufficient evidence to prove "a persistent, widespread practice" of the HCSO under-investigating of officer-involved shootings prior to the Harrison incident. Plaintiffs' theory that this practice caused Wilkinson's use of excessive force on Harrison nevertheless fails for lack of proof that the custom was the "moving force" of a constitutional injury.[29] As noted earlier, to show moving force, Plaintiffs were required to show that the municipal practice affirmatively caused the alleged constitutional injury. *See Brown,* 520 U.S. at 404, 117 S.Ct. 1382; *Fraire,* 957 F.2d at 1281. Mere but-for causation is insufficient. *See Fraire,* 957 F.2d at 1281. The "municipal policy must be *affirmatively* linked to the constitutional violation." *Fraire,* 957 F.2d at 1281 (citing *Dodson,* 454 U.S. at 326, 102 S.Ct. 445 (emphasis added)).

Plaintiffs did not produce evidence that an omission in any investigation was material to the outcome of that investigation. That is, Plaintiffs presented no evidence that any of the investigation outcomes likely would have changed had the additional steps recommended by Plaintiffs' experts been

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[29] The Court, as noted earlier, assumes there was sufficient evidence that Harrison's shooting was a constitutional injury resulting from Wilkinson's use of excessive force.

completed. Nor was there a showing that for the officer-involved shootings the district attorneys could not or did not do additional investigation.[30] There also was no evidence that the putatively poor quality of investigations was known to the deputies generally or those accused of engaging subsequent excessive force incidents in officer-involved shootings. Finally, Plaintiffs did not introduce evidence that deputies' use of excessive force in officer-involved shootings prior to the Harrison shooting went undetected as a consequence of the HCSO's failure to perform more complete investigations.[31] Thus, there is insufficient evidence to support a jury finding that there was a practice of under-investigation that resulted in a custom of deputies' use of excessive force in officer-involved shootings.

Plaintiffs appear to rely heavily on the conclusory, unsubstantiated opinion of their expert, Dr. Klinger, that line workers in an organization tend to break known rules if the rules are not consistently enforced. This opinion has no support in the record as applied to law enforcement officers generally, let alone to alleged excessive deadly force in the serious

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[30] Indeed, Assistant District Attorney Edward Porter stated without contradiction that he or other assistants in fact did participate in the initial investigations on the nights of the shootings and sometimes obtained additional evidence thereafter. Transcript of Testimony of Edward Porter, January 30, 2007 [Doc. # 494], at 10.

[31] As noted, there is a serious factual dispute about the Harrison shooting.

circumstances presented in officer-involved shooting incidents. Further, Dr. Klinger's opinion is unsupported in this record by any detailed explanation or any empirical, psychological, or scientific empirical research or by peer reviewed articles. *See Knight v. Kirby Inland Marine Inc.*, 482 F.3d 347, 355 (5th Cir.2007); *Guy v. Crown Equipment Corp.*, 394 F.3d 320, 325 (5th Cir.2004); *General Elec. Co. v. Joiner*, 522 U.S. 136, 145, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997).

Even if Dr. Klinger's conclusion were shown to be supported by "a reliable basis in the knowledge and experience of his discipline," *Daubert*, 509 U.S. at 593-94, 113 S.Ct. 2786, Plaintiffs' evidence is insufficient to support a jury verdict that the HCSO consistently failed to enforce its excessive force policy through under-investigation of officer-involved shootings (or otherwise). There is no proof that any custom of under-investigation affected line deputies' thinking regarding officer-involved shootings or "affirmatively caused the alleged constitutional injury." Plaintiffs therefore failed to adduce sufficient evidence to establish that the custom was a "moving force" in Harrison's death.

Plaintiffs also needed to prove at trial that the HCSO was deliberately indifferent to the rights of the public to be free from deputies' excessive use of force. *See Piotrowski*, 237 F.3d at 581 (municipal "policy of inadequate officer discipline could be unconstitutional if it was pursued with deliberate indifference toward the constitutional rights of citizens"). The difficulty,

as *Piotrowski* recognized, "is how to prove the existence of such a policy." *Id.* at 581-82. Plaintiffs "must demonstrate that a municipal decision reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision." *Brown,* 520 U.S. at 411, 117 S.Ct. 1382. "Deliberate indifference in this context 'describes a state of mind more blameworthy than negligence.'" *Atteberry v. Nocona General Hosp.,* 430 F.3d 245, 254-55 (5th Cir.2005) (quoting *Farmer v. Brennan,* 511 U.S. 825, 835, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)) (citing *Estelle v. Gamble,* 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)). "[A]cting or failing to act with deliberate indifference to a substantial risk of serious harm . . . is the equivalent of recklessly disregarding that risk." *Farmer,* 511 U.S. at 836, 114 S.Ct. 1970; *Hernandez v. Tex. Dep't of Protective & Regulatory Servs.,* 380 F.3d 872, 880 (5th Cir.2004) ("[t]o act with deliberate indifference, a state actor must consciously disregard a known and excessive risk to the victim's health and safety"); *Alton v. Texas A & M Univ.,* 168 F.3d 196, 201 (5th Cir.1999) (standard for deliberate indifference is whether "the officials' conduct reflected a conscious disregard for the risk that students would suffer bodily injuries of constitutional dimensions at the hands of student cadet leaders"); *Bradley v. Puckett,* 157 F.3d 1022, 1025 (5th Cir.1998) (stating that a plaintiff "must show that the defendants (1) were aware of facts from which an inference of an excessive risk to the [plaintiff's] health or safety could be drawn and (2) that they actually drew an inference that such potential

for harm existed"). Further, a predicate for proof of deliberate indifference is that the plaintiffs "must generally demonstrate at least a pattern of similar violations [of constitutional rights]." *Thompson,* 245 F.3d at 459; *Johnson v. Deep East Texas Regional Narcotics Trafficking Task Force,* 379 F.3d 293, 309 (5th Cir.2004); *Burge v. St. Tammany Parish,* 336 F.3d 363, 373 (5th Cir.2003); *Snyder,* 142 F.3d at 798 (citing *Rodriguez,* 871 F.2d at 554-55).

Plaintiffs did not adduce sufficient proof on this element. Some officer-involved shootings are inevitable in any large, urban environment. Proof that HCSO deputies were involved in officer-involved shootings that occurred but were not submitted to sufficiently rigorous forensic inquiries does not meet the deliberate indifference burden. Plaintiffs did not present proof that the other shooting incidents were sufficiently similar to the Harrison incident so as to create a pattern. Plaintiffs also did not present evidence that HCSO investigators revealed the alleged under-investigation practice, if any, to line deputies or that HCSO policymakers knew that the line officers were aware of such investigation practices.

Plaintiffs' reliance on the conclusion by Dr. Keppel that the HCSO intentionally engaged in substandard investigations of officer-involved shootings also is unavailing. This conclusion, if even admissible, given its conclusory and speculative nature, is not evidence that the County was aware of and consciously disregarded the risk that such a policy would result in the constitutional harm of deputies using

their guns to inflict injury through excessive force. Plaintiffs therefore failed to present adequate evidence that the County adopted an under-investigation policy "with 'deliberate indifference' as to its known or obvious consequences.'" *Johnson,* 379 F.3d at 309. The County is accordingly entitled to judgment as a matter of law on Plaintiffs' under-investigation theory.

Delegation of Administrative Sanctions Determinations to the Grand Jury. – Plaintiffs urge that the HCSO had an unconstitutional official policy for administrative disciplinary review of officer-involved shootings because the HCSO relies on the Harris County District Attorney's presentation of each incident to a grand jury, and the HCSO imposes discipline only if the grand jury votes to indict the deputy for a crime (the "delegation theory").[32] This practice is unconstitutional, Plaintiffs assert, because the district attorney and grand juries only investigate cases believed to involve criminal matters and there is no meaningful way to assess what is considered by the grand jury.[33] Plaintiffs posit further that the

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[32] The HCSO will impose administrative discipline for violations of objective rules. *See* note 12, *supra.*

[33] *See* Plaintiffs' Pre-Trial Brief Regarding Criminal Law Standard for Reviewing Officer-Involved Shootings [Doc. # 421], at 2 ("[S]uch a criminal law burden of proof deprives citizens of constitutional rights by requiring proof 'beyond a reasonable doubt' before offending officers would be punished for using excessive force. Constitutional rights, however, are to be protected under a preponderance of the evidence standard.").

HCSO has failed to punish deputies for firing their weapons when the HCSO policymakers knew, or should have known, that the incidents involved excessive uses of force under a civil, but not criminal, burden of proof. Plaintiffs elaborate that the HCSO's reliance on the grand jury to vet the justification of an officer's use of force was, as a matter of law, legally improper because (i) the grand jury evaluates conduct against an unjustifiably stringent standard, *i.e.*, evaluation of whether he may have committed a crime; (ii) civil issues such as a deputy's alleged commission of a civil constitutional violation cannot be assessed by a grand jury, guided by the County's District Attorney, each of which is charged with evaluation of criminal matters only; (iii) as a practical matter, the grand jury's analysis is governed by the "beyond a reasonable doubt" standard, rather than the civil law "preponderance of the evidence" standard applicable to allegations of civil rights violations; and (iv) the secrecy of the criminal grand jury unfairly deprives Plaintiffs and the Court of the ability to conduct meaningful civil review of the HCSO's conduct with respect to Wilkinson and other deputies.[14] Plaintiffs thus deduce in their delegation theory that there is a lack of adequate HCSO administrative review of officer-involved shootings, which in turn results in deputies' unconstitutional use of excessive force against citizens. The Court

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[14] *See* Plaintiffs' Response [Doc. # 520], at 2.

assumes that HCSO's reliance on the grand jury is a formal official policy under § 1983.

The Court turns to the "moving force" element of proof in a § 1983 claim. Plaintiffs did not adduce evidence sufficient to support a jury verdict on this issue. As noted earlier, to show moving force, Plaintiffs were required to show that the municipal practice *affirmatively caused* the alleged constitutional injury. *See Brown,* 520 U.S. at 404, 117 S.Ct. 1382 (there must be a "direct causal link between the municipal action and the deprivation of federal rights"); *Fraire,* 957 F.2d at 1281 (the "municipal policy must be *affirmatively* linked to the constitutional violation" (citing *Dodson,* 454 U.S. at 326, 102 S.Ct. 445)). Mere "but-for" causation is insufficient. *See Fraire,* 957 F.2d at 1281 (emphasis added). Plaintiffs needed to present at trial circumstantial or direct evidence sufficient to support a jury verdict that Wilkinson knew that the County would delegate to the grand jury decision-making authority regarding officer-involved shootings, and also that this knowledge was the affirmative cause for Wilkinson to use deadly excessive force on Harrison. Construing the evidence in the light most favorable to Plaintiffs, they did not meet this burden.

Plaintiffs rely primarily on Wilkinson's testimony for the "moving force" element on this theory. Wilkinson testified that he was aware of some of the HCSO

officer-involved shootings[35] and was acquainted with at least three officers whom he later learned had been involved in shootings.[36] Wilkinson testified that he knew that the HCSO did an investigation of the facts and then referred the matter to a grand jury, which would decide whether the shooting was justified.[37] He was not aware of any instances in which officers were indicted, except for an incident in which one deputy shot another deputy.[38] Wilkinson denied having specific knowledge of the details of other incidents or

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[35] *See* Transcript of Testimony of William Wilkinson, January 30, 2007 ("Jan. 30 Wilkinson Tr.") [Doc. # 497], at 41 ("The shootings where a deputy was injured or lost his life, we heard about it, so I could assume that I knew of the shooting.").

[36] Wilkinson initially testified that he knew a number of deputies that had been involved in shootings, but was not certain that he had known them before he shot Harrison. *See id.* at 41-42. He was certain, however, that he had known of the shootings themselves, and at least three of the deputies. *Id.* at 41, 52.

[37] Jan. 30 Wilkinson Tr., at 34 ("Q. [You knew] that [the Harrison shooting] would be considered by a criminal grand jury? A. Yes, sir. Q. Okay. And that that criminal grand jury would make the final decision about whether the shooting was justified or not[?] A. I wasn't sure how it worked, sir."). Wilkinson later explained that he did understand the grand jury's role. *See id.* at 45 ("Q. [P]rior to the shooting of Hiji Harrison, if a shooting was determined to be justified, did you understand that to be by the grand jury or someone else? A. Grand jury, I assume, sir. . . . Q. But in terms of making a determination of whether your shooting, your use of force was justified or not, you were relying upon the grand jury to do that? A. One part of it, sir.").

[38] *See* PX 410.

the outcomes of the investigations.[39] Under applicable law, the evidence presented by Plaintiffs is not sufficient to prove that the HCSO's delegation of the disciplinary decision to the grand jury was a moving force, *i.e.*, an affirmative cause, of Wilkinson's shooting of Harrison. There is no evidence of what Wilkinson's understanding was of the burdens of proof that apply in the grand jury setting.[40] There is no evidence that Wilkinson believed the "beyond a reasonable doubt" standard would apply in the grand jury setting and that this belief would make it more likely that Wilkinson would shoot and kill Harrison than if he believed that the HCSO supervisors made the administrative decision about deputy punishment.

Plaintiffs in their Memorandum argue Wilkinson was "motivated" to act improperly toward Harrison.[41]

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[39] Jan. 30 Wilkinson Tr., at 25 ("we understand and hear when someone was shot, but we don't get the details or who was involved, usually").

[40] As a matter of law, the grand jury issues an indictment when it determines that there is "probable cause" to prosecute the accused. *Rodriguez v. State*, 104 S.W.3d 87, 93 (Tex.Crim.App.2003) ("The grand jury will not indict unless sufficient probable cause exists and there is enough evidence to formally charge a person with an offense.") "Probable cause exists where the police have reasonably trustworthy information sufficient to warrant a reasonable person to believe a particular person has committed or is committing an offense." *Guzman v. State*, 955 S.W.2d 85, 87 (Tex.Crim.App.1997). The "beyond a reasonable doubt" standard is a prosecutor's burden at trial, not at the indictment stage.

[41] Plaintiffs argue that there is "sufficient evidence for a reasonable jury to conclude Wilkinson's conduct on the night in question was motivated by a belief that he could violate

(Continued on following page)

Plaintiffs' argument so phrased falls by its own weight. The standard to prove a "motivating factor" is less stringent than a showing of a "but for" cause. *See Septimus v. Univ. of Houston,* 399 F.3d 601, 608 (5th Cir.2005) (plaintiff in a Title VII action was "held to a lower standard in proving the causation element" where the district court instructed the jury on a "motivating factor" rather than "but for" causation standard); *Pineda v. United Parcel Service, Inc.,* 360 F.3d 483, 487 (5th Cir.2004). Proof of a "motivating factor" or a "but-for-cause" does not meet Plaintiffs' § 1983 burden to show that the HCSO's policy was the moving force for Wilkinson's conduct requires *Brown,* 520 U.S. at 404, 117 S.Ct. 1382; *see Fraire,* 957 F.2d at 1281.

Plaintiffs also attempt to show "moving force" causation through evidence that Wilkinson "had the training manual indicating the review process by the district attorney and grand jury."[42] This theory is futile. Plaintiffs point to a single lesson plan from the

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Harrison's civil rights." Plaintiffs' Mem., at 4. Plaintiffs further assert: "Wilkinson testified that he was aware that investigations of other sheriff [*sic*] deputies involved in multiple shootings were being undertaken. . . . Thus, there is sufficient evidence for a reasonable jury to conclude Wilkinson's conduct on the night in question was motivated by a belief that he could kill Harrison, manufacture evidence (throw down gun) to create reasonable doubt, and escape accountability." *Id.*, at 4-5.

[42] Plaintiffs' Mem., at 4.

HCSO's training academy.[43] This document was not introduced in evidence at trial or submitted to the jury. It is thus cannot be part of the Court's Rule 50(b) consideration. Even if the lesson plan had been received in evidence, it establishes at most that Wilkinson learned that the district attorney's duty was to "[m]ake sure shooting in compliance with law/civil rights law [*sic*],"[44] and that the grand jury "[i]nvestigates all shootings."[45] This standard is vague at best and there is no evidence of how Wilkinson or any other deputy interpreted it.[46] No reasonable jury could find, on the basis of the evidence at trial or the lesson itself, that the materials used to train Wilkinson constituted a direct, causal link between any County policy and Harrison's injury.[47]

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[43] *See* Harris County Sheriff's Academy Instructor's Lesson Plan ("Lesson Plan") [Doc. # 512], Appendix to Plaintiffs' Response.

[44] Lesson Plan, at 27.

[45] *Id.* at 29.

[46] Neither this document, nor any evidence admitted at trial, suggests that Wilkinson had any understanding about the burdens of proof borne by prosecutors during the grand jury and trial phases of a criminal case, how these standards differ from the burden of proof in a civil case, or how the various standards might affect the results of an officer-involved shooting investigations.

[47] Plaintiffs' theory ignores the practical reality that deputies who injure members of the public are subject to civil litigation for money damages, even when there is no administrative or criminal punishment.

Plaintiffs' delegation theory also is not legally viable because the evidence fails as a matter of law to satisfy the final element of a § 1983 claim, that the HCSO was "deliberately indifferent" to the public's constitutional rights to be free from deputies' use of excessive force caused by HCSO's delegation to the grand jury of the administrative punishment decision in officer-involved shootings. As noted, Plaintiffs "must demonstrate that a municipal decision reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision." *Brown*, 520 U.S. at 411, 117 S.Ct. 1382. There is no proof that any HCSO policymaker through the delegation decision consciously disrearded a known and excessive risk to the constitutional rights of the public. *See Hernandez*, 380 F.3d at 880.

In summary, although the HCSO plainly delegated to grand juries (through County prosecutors) the duty to determine for administrative purposes if deputies used excessive force in officer-involved shootings, Plaintiffs have failed to present adequate evidence that this delegation policy was the moving force behind Wilkinson's alleged use of excessive force against Harrison or that the HCSO was deliberately indifferent to the members of the public's constitutional rights by using this policy. The County is entitled to judgment on this theory as a matter of law.

Failure to Supervise. – Plaintiffs argue that the HCSO failed to supervise Wilkinson, and that this

omission was the cause of Harrison's death, the constitutional injury claimed in this case.[48] "Supervisory officials cannot be held liable under section 1983 for the actions of subordinates . . . , on any theory of vicarious or respondeat superior liability." *Estate of Davis,* 406 F.3d at 381 (citing *City of Canton,* 489 U.S. at 385, 109 S.Ct. 1197; *Monell,* 436 U.S. at 691, 98 S.Ct. 2018; *Evett v. DETNTFF,* 330 F.3d 681, 689 (5th Cir.2003); *Alton,* 168 F.3d at 201; *Thompkins v. Belt,* 828 F.2d 298, 303-04 (5th Cir.1987)). "Rather, Plaintiffs must show that the conduct of the supervisors denied [Harrison] his constitutional rights." *Id.* (citations omitted). To prove a failure to supervise claim under § 1983, "the plaintiff must show that: (1) the supervisor . . . failed to supervise . . . the subordinate official; (2) a causal link exists between the failure to . . . supervise and the violation of the plaintiff's rights; and (3) the failure to . . . supervise amounts to deliberate indifference." *Id.* (quoting *Smith v. Brenoettsy,* 158 F.3d 908, 911-12 (5th Cir.1998), and citing, *e.g., Burge,* 336 F.3d at 370; *Cousin v. Small,* 325 F.3d 627, 637 (5th Cir.2003); *Thompson,* 245 F.3d at 459); *see Kohler v. Englade,* 470 F.3d 1104, 1114-15 (5th Cir.2006).

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[48] Plaintiffs also appear to assert an argument that the HCSO failed to adequately train Wilkinson. *See* Plaintiffs' Response, at 2-3. Before trial, however, Plaintiffs acknowledged in open court that there was no failure to train element to their claims against the County. *See* Transcript of Hearings held on September 11, 2006 [Doc. # 307], at 114. Plaintiffs thus abandoned this claim.

To prevail on a failure to supervise claim, the Plaintiffs must identify the supervisors who allegedly failed to perform the necessary duties and demonstrate that the identified individual(s) "had subjective knowledge of a serious risk of harm to the victims [or a category of people]." *Atteberry,* 430 F.3d at 255. "The test for deliberate indifference is subjective, rather than objective, in nature because 'an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment.'" *Id.* (quoting *Farmer,* 511 U.S. at 838, 114 S.Ct. 1970); *see also Hernandez,* 380 F.3d at 880; *Palmer v. Johnson,* 193 F.3d 346, 352 (5th Cir.1999). Following the Supreme Court's clear direction, the Court "may infer the existence of this subjective state of mind from the fact that the risk of harm is obvious." *Hernandez,* 380 F.3d at 881 (quoting *Hope v. Pelzer,* 536 U.S. 730, 738, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002)) (emphasis in *Hernandez*).

"Proof of more than a single instance of the lack of training or supervision causing a violation of constitutional rights is normally required before such lack of training or supervision constitutes deliberate indifference." *Thompson,* 245 F.3d at 459 (citing *Snyder,* 142 F.3d at 798-99; *Belt,* 828 F.2d at 304-05). "The plaintiff must generally demonstrate at least a pattern of similar violations." *Id.* (citing *Snyder,* 142 F.3d at 798). "Furthermore, the inadequacy of [supervision] must be obvious and obviously likely to result in a constitutional violation." *Id.* (citing *City of*

Canton, 489 U.S. at 390 n. 10, 109 S.Ct. 1197; *Snyder,* 142 F.3d at 799). Standing alone, an expert's opinion generally will not be enough to establish deliberate indifference. *Id.*

Plaintiffs in their post-trial submissions rely on seven incidents in which Wilkinson allegedly used excessive force without being sanctioned or reprimanded, and thus that the HCSO's supervision of him was inadequate. Plaintiffs' evidence consists largely of one page listing of five incidents, two investigations by the HCSO IAD involving earlier incidents, and the Harrison IAD file.[49] Plaintiffs' arguments are unavailing under the applicable legal authority on failure to supervise claims. Two of the events have no probative value because they are not incidents prior to the Harrison shooting. One is the Harrison incident itself, and the other is an incident subsequent to Harrison's death. The latter did not involve force, and was the cause of the HCSO's termination of Wilkinson's employment.[50] Plaintiffs also rely on an incident involving Ronald Lynch, a victim of an alleged assault by Wilkinson. Lynch never filed a written complaint or formally brought it to the HCSO's attention, however, and this incident

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[49] *See* Defendant's Exhibit ("DX") 110, at IAD 14133 (one page list); DX 110 (Barkley incident); DX 111 (Juarez incident); PX 289, 292 [other cites to Harrison investigation files].

[50] *See* Transcript of Testimony of William Wilkinson, January 29, 2007 ("Jan. 29 Wilkinson Tr."), at 9-10.

was not before the jury. The Court cannot consider these three incidents for purposes of Rule 50(b).

Another incident, which took place on May 7, 2004, eight days before the Harrison encounter, involved Robert Barkley, whom Wilkinson was trying to arrest for shoplifting in Humble, Texas. Wilkinson, while working an approved "extra job," shot Barkley outside a Dillard's store while Barkley was in his car in the parking lot. Wilkinson claimed Barkley was trying to escape and to run him over. The HCSO allowed Wilkinson to return to work within days of the event. The case was presented to a Harris County grand jury, which issued a "no bill" in late September 2005. This incident has limited probative value because the HCSO investigation was still underway when the Harrison incident occurred.[51]

Plaintiffs also adduced evidence from Bonifacio Juarez, a detainee who alleged that on October 6, 2003, Wilkinson beat him while he was handcuffed in a HCSO station house.[52] Juarez filed a complaint against Wilkinson. Wilkinson complained that Juarez severely kicked and otherwise attacked him. The Harris County District Attorney prosecuted Juarez for assaulting Wilkinson, and Juarez pleaded guilty.

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[51] *See* DX 110, at IAD 14134. On or about June 4, 2004, the HCSO did its own IAD investigation and later referred the matter to the Harris County District Attorney.

[52] *See* DX 111.

The facts of this incident were hotly contested at the time and at trial.

There are no details whatsoever in the record on the two remaining incidents on which Plaintiffs rely. Plaintiffs refer to one as an "[a]ssault against residents of a home during a warrantless search (exonerated)" and the other as "[p]hysical assault of a black motorist and use of racial epithet (exonerated)."[53] Plaintiffs cite to no admissible evidence in the record on these events and they therefore are not probative of the issues at bar. Thus, the Court considers whether Plaintiffs have established a fact issue on the failure to supervise claim based on the Barkley, Juarez, and Harrison incidents. The outcome of this question turns on whether, when construed in the light most favorable to Plaintiffs, the Barkley and Juarez incidents can be construed as being sufficiently similar to the Harrison shooting to potentially form a pattern that supports a finding that the HCSO's conduct caused Wilkinson to shoot Harrison and a finding that the HCSO was deliberately indifferent to the rights of the public under the Fifth Circuit's rigorous standard. *See Smith,* 158 F.3d at 911-12; citations *supra* at 551-52.

The Court, based on a careful review of the record and construing the evidence in the light most favorable to Plaintiffs, concludes that the trial evidence does not support a reasonable jury's finding

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[53] DX 110, at IAD 14134.

that the HCSO's failure to supervise Wilkinson caused him to shoot Harrison. As to causation, Plaintiffs contend that the HCSO should not have allowed Wilkinson to resume his duties after the Barkley shooting on May 7, 2004, which followed the Juarez incident in October 2003. Plaintiffs do not establish that the unnamed supervisors were a cause-in-fact of Harrison's injury. *See Estate of Davis,* 406 F.3d at 381 (requiring "a causal link . . . between the failure to train or supervise and the violation of the plaintiff's rights"); *Evett,* 330 F.3d at 689 (requiring "a 'sufficient causal connection' between the supervisor's conduct and the constitutional violation" (citing *Thompkins,* 828 F.2d at 304)); *Southard v. Texas Bd. of Criminal Justice,* 114 F.3d 539, 550 (5th Cir.1997) ("the misconduct of the subordinate must be affirmatively linked to the action or inaction of the supervisor"). Even assuming that the HCSO improperly allowed Wilkinson to resume his patrol duties after he was accused of wrongdoing while in the station house and while working an approved outside job, there is no affirmative link between that decision and Wilkinson's use of excessive force, which, as alleged, violated HCSO's official policies and standards.[54]

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[54] Plaintiffs claim amounts to a theory that "but for" the HCSO allowing Wilkinson to resume his duties shortly before May 16, 2004, he would not have been in a position to arrest and shoot Harrison. But for causation is insufficient.

Turning to deliberate indifference, Plaintiffs have not demonstrated which supervisor was remiss or "had subjective knowledge of a serious risk of harm to the victims [or a category of people]." *Atteberry,* 430 F.3d at 255. Plaintiffs have not shown any member of the HCSO "both [was] aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and . . . also [drew] the inference." *See Smith,* 158 F.3d at 911-12 (citing *Farmer v. Brennan,* 511 U.S. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994); *Wilson v. Seiter,* 501 U.S. 294, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991)). Nor have Plaintiffs shown that any particular person was reckless in disregarding the potential harm to the public of allowing Wilkinson to resume his duties in May, 2004. There is no evidence that anyone in the HCSO drew the conclusion from the Juarez or Barkley incidents that there was a serious risk that Wilkinson was a danger to others or that any supervisor ignored such conclusion. Plaintiffs did not produce sufficient evidence that any particular supervisor's failure to supervise Wilkinson was the cause of Harrison's death or that any particular supervisor was deliberately indifferent to the rights of the public.[55]

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[55] Plaintiffs also implicitly argue that the HCSO violated § 1983 for failing to discipline Wilkinson for his past misconduct. This theory was explicitly presented to the jury only as a component of the ratification theory, which is discussed in the next section of this Memorandum. *See* Jury Charge [Doc. # 474], at 10. If this theory could be an independent custom or practice, *Piotrowski,* 237 F.3d at 581 ("Self-evidently, a City policy of

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B. *Ratification*

Defendant County contends that Plaintiffs failed to adduce evidence sufficient to support a reasonable jury's verdict that the County, through the HCSO, ratified Wilkinson's alleged use of deadly excessive force.[56] Ratification occurs "when a subordinate's decision is subject to review by the municipality's authorized policymakers," and "the authorized policymakers approve a subordinate's decision and the basis for it." *Praprotnik,* 485 U.S. at 127, 108 S.Ct. 915. Ratified misconduct is "chargeable to the municipality because [the authorized policymakers'] decision is final." *Id.* Harrison's death, even if not otherwise attributable to an official policy or practice, would therefore support the County's liability if the County (through the HCSO) knowingly approved of Wilkinson's misconduct in shooting Harrison.

Plaintiffs argue that "Chief Deputy Billingsley affirmatively testified that the Sheriff approves of Wilkinson's use of force on the night in question," and that "Harris County admits that Wilkinson's conduct on the night in question conformed with approved practices and policies of the sheriff [*sic*] department."[57]

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inadequate officer discipline could be unconstitutional if it was pursued with deliberate indifference toward the constitutional rights of citizens."), it suffers the same defects as Plaintiffs' "failure to supervise" and other claims, and is futile.

[56] *See* County Motion, at 21-22.

[57] Plaintiffs' Mem., at 9 n. 8. *See* Transcript of Testimony of Danny Billingsley, January 26, 2007 ("Billingsley Tr."), at 10

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These admissions are not sufficient to establish Plaintiffs' ratification theory. Ratification creates liability where "a municipality's final policymakers are held effectively to have made policy or condoned creation of a custom by ratifying the unconstitutional or illegal actions of subordinate officers or employees." *Turner v. Upton County,* 915 F.2d 133, 137 (5th Cir.1990). Plaintiffs were therefore required to present evidence not merely that a policymaker knew and approved of the shooting, but that the policymaker knew that the shooting violated Harrison's civil rights because the shooting was clearly excessive to Wilkinson's apparent need to defend himself. Wilkinson, the only surviving witness to the events of testified to his version of the events in question, gave an account of the shooting that, if believed, justified his actions. If the relevant policymaker believed Wilkinson's version of events, then the County did not ratify "unconstitutional or illegal actions." *Id.* The Fifth Circuit has explicitly held that a municipality is not liable under the ratification theory where a sheriff accepts his deputies' version of events, so long as "that version did not show that the deputies' actions were manifestly indefensible." *Coon v. Ledbetter,* 780 F.2d 1158, 1162 (5th Cir.1986); *see also Fraire,* 957 F.2d at 1268 ("Plaintiffs present nothing but conjecture when they allege that [the municipality] must have known [the officer] was lying.").

(agreeing that "Sheriff Tommy Thomas approves of the manner in which William Wilkinson shot and killed Hiji Harrison").

The County's evidence, the testimony of the HCSO officers, contradicted Plaintiffs' theory, and the jury could not reach a verdict. Plaintiffs do not (and cannot) argue that they introduced evidence sufficient to support a reasonable jury verdict that the County's policymaker disbelieved Wilkinson's account but ratified his conduct regardless.[58] Plaintiffs have no proof that the County in 2004 believed Plaintiffs version of events from the night in question was false, and Plaintiffs' bare assertion is not sufficient to carry their burden on a motion for judgment as a matter of law.[59]

C. *Plaintiffs' Motions*

Finally, the Court addresses the viability of Plaintiffs' Motion and the James Motion. Having concluded above that Plaintiffs have failed to produce at trial evidence to support all the elements on any of their claims, and therefore concluding that those

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[58] Plaintiffs' response to the County's Motion merely recites, without explanation or citation to any evidence, that "Harris County, with full knowledge of Wilkinson's conduct on the night in question, has ratified and accepted same as conduct that complied with approved policies and practices of the County." Plaintiffs' Response, at 2. It is noted that Plaintiffs argued and presented evidence at trial that all or part of Wilkinson's account was false.

[59] Indeed, it took Plaintiffs years to develop evidence in support of their factual theory of the night in question.

claims must be dismissed, it is not necessary to reach Plaintiffs' Motion and the James Motion.[60]

V. *CONCLUSION*

The County has demonstrated that Plaintiffs failed to adduce evidence at trial sufficient to support a jury verdict in their favor on any of Plaintiffs' claims against the County. A reasonable jury could not have found, on the basis of the evidence at trial, that the County adopted an official policy, practice, or custom that was the moving force of Harrison's death, even if it found that Wilkinson was unjustified in his use of deadly force. A reasonable jury also could not find on the basis of the trial evidence that any of the alleged, articulated policies had a sufficient causal connection to Harrison's death to meet the "moving force" requirement for § 1983 liability.

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[60] In any event, the Motions would be denied. Plaintiffs cite no authority for the proposition that a purely legal dispute is the proper subject of a motion for judgment as a matter of law after trial, when no Rule 50(a) motion was made. The Court rejects Plaintiffs' arguments to the contrary. Even if the Court found that HCSO's delegation policy was legally insufficient to protect the civil rights of citizens subjected to deputies' non-criminal use of excessive force, as Plaintiffs urge, Plaintiffs would still be required to show the other elements of § 1983 liability, such as moving force and deliberate indifference. Having failed to move under Rule 50(a) before the jury commenced deliberating, Plaintiffs may not now bring a motion under either Rule 50(a) or 50(b). Plaintiffs' Motion would accordingly be denied on this procedural basis, if any of Plaintiffs' claims survived.

Further, Plaintiffs failed to introduce evidence adequate to support a reasonable jury's conclusion that the County, through the HCSO, was aware of constitutional harms likely to result from any of the challenged and provable policies.[61] Without such awareness, Plaintiffs cannot show deliberate indifference on the part of the County, precluding municipal liability under § 1983.

Nor could a reasonable jury have found that the County knew that Wilkinson's account of the events in question was false, but chose to ratify his conduct.

Accordingly, the County is entitled to judgment as a matter of law on all Plaintiffs' claims asserted at trial. It is therefore

ORDERED that Defendant Harris County's Motion for Judgment as a Matter of Law [Doc. # 485] is **GRANTED**. It is further

ORDERED that Plaintiffs' Joint Motion for Judgment as a Matter of Law [Doc. # 508] is **DENIED**. It is further

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[61] The County would presumptively be aware of constitutional harms arising from a *per se* policy of utilizing excess force. The Court has held, however, that Plaintiffs have not introduced sufficient evidence to allow a reasonable jury to conclude that such a policy existed. *See* pp. 543-45, *supra*.

ORDERED that Plaintiff Julian James's Motion for Judgment as a Matter of Law [Doc. # 524] is **DENIED**.

The Court will issue a separate Final Judgment.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

JULIAN JAMES, *et al.*, Plaintiffs,	§	
v.	§	CIVIL ACTION NO. H-04-3576
HARRIS COUNTY, Defendant.	§	

FINAL JUDGMENT

For the reasons set forth in the Court's Memorandum and Order entered this day, it is hereby

ORDERED that Defendant Harris County's Motion for Judgment as a Matter of Law [Doc. # 485] is **GRANTED**. It is further

ORDERED that Plaintiffs' Joint Motion for Judgment as a Matter of Law [Doc. # 508] is **DENIED**. It is further

ORDERED that Plaintiff Julian James's Motion for Judgment as a Matter of Law [Doc. #524] is **DENIED**. It is further

ORDERED, ADJUDGED and DECREED that judgment is entered for Defendant Harris County on all Plaintiffs' claims.

This is a final, appealable order.

SIGNED at Houston, Texas, this **20th** day of **August, 2007**.

/s/ Nancy F. Atlas
Nancy F. Atlas
United States District Judge